Supreme Court, U. S.
FILED
OCT 4 1978
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-566

GERALDINE POWELL,

Petitioner,

v.

SYRACUSE UNIVERSITY, DOCTOR MELVIN EGGERS, Chancellor of Syracuse University, SCHOOL OF ARCHITECTURE, a sub-unit of Syracuse University, JULIO SAN JOSE, Acting Dean of the School of Architecture, Syracuse University,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 29, 1978

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SYRACUSE UNIVERSITY, DOCTOR MELVIN EGGERS, Chancellor of Syracuse University, SCHOOL OF ARCHITECTURE, a subunit of Syracuse University, JULIO SAN JOSE, Acting Dean of the School of Architecture, Syracuse University,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Geraldine Powell, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 13, 1978.

Opinions Below

The opinion of the United States District Court for the Northern District of New York, the Honorable Edmund Port presiding, is not reported. It was entered on August 5, 1977 and is set forth herein, *infra*, as Appendix A.

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported. It was entered on July 13, 1978 and is set forth herein, *infra*, as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 13, 1978. Jurisdiction of this Court is invoked, within ninety (90) days of the foregoing entry, pursuant to 28 U.S.C. Section 1254 (1).

Question Presented

Where a Black professional's Title VII prima facie case of individually oriented racial discrimination establishes that the only evidentially documented factors discussed at the time of the adverse employment decision were race oriented, whether a university employer can rebut said case by mere articulation of race neutral reasons, without more, at the post evidential hearing two years later.

Statutory Provision Involved

This case involves subdivision (a) of Section 703 of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended by Section 8 of Public Law 92-261, March 24, 1972, 86 Stat. 109, 42 U.S.C. Section 2000e-2(a). This subdivision is set forth herein, *infra*, as Appendix C.

Statement of the Case

The following statement of facts is by and large excerpted from the opinion of the Circuit Court below and based upon findings made by the District Court.

Ms. Powell, the Petitioner herein, has an extensive academic background. She received a Registered Nurse's degree from New York University in 1959. In 1971, she received a Bachelor of Fine Arts degree from Syracuse

University and, in January, 1973, was awarded the Master of Fine Arts degree in Environmental Design. Her master's thesis concerned the relationship of low income housing to a black perspective. The Petitioner was hired for the 1972-73 academic year at the rank of lecturer (part-time) on the faculty in the Syracuse University School of Architecture.

During the fall semester, 1972, Petitioner taught one section of the basic design course, an art discipline and oriented course also taught by white, tenured non architectural degreed males on the faculty. Prior to 1975, a detailed student manual for this course did not exist and each section teacher was free to fashion his own course curriculum after reading the course description in the School of Architecture's annual bulletin and consulting with the dean and other faculty members teaching the course. The Petitioner did not receive any criticism from other faculty members during her first year on the faculty.

The Petitioner was a part-time visiting assistant professor on the faculty during the 1973-74 school year. She taught architectural rendering, served as advisor to minority students, and delivered five guest lectures on non-western architecture. No formal description of the rendering course was developed until September, 1974. The school's faculty disagreed as to whether rendering was best taught by an architect or an artist.

In November, 1973, Petitioner was advised by the dean that her employment status was to be reviewed by the Committee on Hiring, Promotion, and Tenure. Shortly before the Thanksgiving vacation, Petitioner was asked to provide the Committee with a summary of her Master's thesis and samples of her student's work. The Petitioner was under the impression that she had only a couple of days during which to organize her submission, although the dean

testified that he told her that the material was not required until December 1, an approximately ten-day period. Petitioner submitted those student projects which had been left in the studio during the vacation period, believing that they did not represent the best of her student's work and advising the dean of the same. She also submitted a handwritten summary of her thesis. She did not, however, request a postponement of the Committee meeting as she was not aware that she could do so (since she was never advised of the same and since there were no written procedures relative to evaluation).

The Tenure Committee met on December 1, 1973 to consider the Petitioner's continued employment during the 1974-75 school year. The dean, six faculty members, and two students attended the meeting (out of a total of 15 members). The minutes of this meeting indicate that the only discussion of the Petitioner revolved around race oriented considerations, including her approach to a "black aesthetic". The minutes also reflect that a white, female faculty member was permitted to delay committee consideration of her case.

There were no oral or written description of the Petitioner's duties while on the faculty nor any criteria or procedures for assessing her performance or, for that matter, any individual's performance, leaving the legitimacy and rationality of a specific employment evaluation to the context of that particular time and place rather than to a uniform and defined scheme.

The Committee voted to terminate the Petitioner. The dean transmitted the results of the Committee vote to the Petitioner indicating that he believed that the Committee thought the Petitioner unduly "nationalistic." The Petitioner refused to submit a letter of resignation, appealing to the University Senate's Sub-committee on Academic

Freedom. The Sub-committee found that there had been procedural irregularities in the disposition of the case. It recommended the reinstatement of the Petitioner or, alternatively, the payment of compensation, but these suggestions were rejected by the Respondents. The Petitioner received a letter of termination in May, 1974. The School of Architecture later hired a white male with a master's degree in architecture to teach rendering and a white female with a Master of Fine Arts degree to teach basic design. It also hired a white female with a Master's and Doctoral degree in history to teach architectural history.

Petitioner filed a claim of discrimination based on race, color or sex with the New York State Division of Human Rights. After hearings before an agency examiner, the Division of Human Rights dismissed the Petitioner's complaint. While the state complaint was pending, Petitioner filed a similar complaint with the Equal Employment Opportunity Commission ("EEOC"), receiving a right-to-sue letter on September 10, 1975. She subsequently commenced the action herein within the 90-day period required by the statute, invoking the jurisdiction of the federal Court under both Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e) *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. Section 1981). The case was submitted to the district court upon the transcript of hearings before the New York State Division of Human Rights, stipulated facts and exhibits, and the parties' briefs.

Of those who voted against the Petitioner and testified before the New York State Division of Human Rights, most asserted that their votes were based on an evaluation of student work and on the Petitioner's non architectural degreed background. They testified further that their attitudes had not been influenced by the Petitioner's race or sex.

Two of the Respondents own witnesses testified that their respective votes were not based on the evaluation of the students work (since in their professional opinions such a criteria was invalid). See: Testimony of Professors Kermit Lee and Wolfgang Schueller at pages 1165, *et seq.* in Record below. That position was supported by others, as well, who testified in the Petitioner's case in main. See: Testimony of Professor Siegfried Synder at pages 500-524 in Record below; Testimony of former Professor David Richards at pages 537-552.

Ultimately, the United States District Court for the Northern District of New York, the Honorable Edmund Port presiding, dismissed the case finding that the Petitioner had failed to make out a prima facie case but holding that, even assuming that she had done so, the Respondents had satisfactorily rebutted the same by and through their articulation that they did not discriminate because of race or sex.

The Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit. The majority of Circuit panel held that, contrary to the decision of District Judge Port, the Petitioner did make out a prima facie case of individual racial discrimination under Title VII of the Civil Rights Act of 1964; but that the District Judge was not clearly erroneous in finding that the Respondents had rebutted said prima facie case. Accordingly, the Circuit below affirmed the trial court's ultimate conclusion (or parts thereof).

Believing that the Court below was clearly erroneous in its application of Title VII principles, particularly those enunciated by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Petitioner seeks review of the judgment herein.

The ultimate consequence of the decision below is to insulate largely white University communities from the scrutiny of a federal court, in the context of civil rights and constitutional litigation, by permitting a University employer, through mere articulation of race neutral criteria without more, to rebut evidentially documented and established racial criteria and inferences which flow therefrom, at the time of the adverse employment decision. Such a decision forbodes that those largely white institutions will remain largely white and will be insulated from scrutiny of the institutional practices which have adversely affected minorities, fostered racially stratified environments such as that in which the Petitioner was evaluated herein, and resulted in wrongful and racially discriminatory actions such as that challenged herein.

REASONS FOR GRANTING THE WRIT

1. This Court has never enunciated the degree to which an employer must sustain his burden in rebuttal once an adversely affected employee has established a Title VII prima facie case of individually oriented racial discrimination which includes, among other things, evidential documentation that the sole factors considered at the time of the adverse decision were race oriented factors.

While this Court has enunciated an elaborate three-prong burden of proof requirement in an individually oriented Title VII racial discrimination matter, See: *McDonnell Douglas Corp.* v. *Green, supra,* it has never enunciated the degree to which an employer must sustain his burden of proof once an adversely affected employee has established a prima facie case, which includes, among other things, evidential documentation that the sole factors considered at the time of the adverse decision were race oriented factors and "personality" factors, thereby shifting the burden to the employer to rebut the inference of racial

discrimination attendant to the prima facie case. See: *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1256 (5th Cir. 1977).

The Court below did not specifically make a determination on this issue notwithstanding that the Petitioner requested the Court to do so (See: Table of Contents in Appellant's Brief to the Court below, setting forth the argument in this regard, as Appendix F herein, *infra*) and notwithstanding the Petitioner's belief that, unless such was done, the Court would find the articulated reasons given by the Respondents herein (at the post termination hearing before the State Division of Human Rights) to be sufficient to rebut the Petitioner's cause of action precisely because this Court has enunciated the principle that all that is necessary to rebut a Title VII prima facie case of individually oriented racial discrimination is mere articulation of race neutral reasons and nothing more. However, it is submitted that something more than articulation is required.

It is submitted that, where a Black professional's Title VII prima facie case of individually oriented racial discrimination establishes that the only evidentially documented factors discussed at the time of the adverse employment decision were race oriented, a University employer must establish by clear and convincing evidence that the otherwise articulated race neutral reasons, asserted for the first time at the evidential hearing two years after the adverse decision, are, in fact, the reasons for said termination (or put another way, the employer must establish in a clear and convincing manner, that, even absent the discrimination, the employee would not have been retained).

Notwithstanding the lack of case law discussion focusing on the degree to which a Title VII employer must carry his/her burden once the employee has established a prima

facie case of discrimination, including therein documented evidence that the only considerations recorded at the time of the decision were racially oriented (thus satisfying the first prong of the *McDonnell Douglas* three-prong allocation of proof requirement and shifting the burden, accordingly), there is discussion in other civil rights oriented matters which, by analogy, support the proposition that, under the circumstances described, the employer must rebut the prima facie case in a clear and convincing manner or otherwise fail to expunge the clearly established racial considerations.

Of particular value and significance in discussing this proposition are those civil rights actions brought pursuant to the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and the Fourteenth Amendment to the United States Constitution where a Black teacher, alleging that her termination from employment with a school district was racially motivated, established a prima facie case, under the criteria established by the Courts, with the burden shifting to the defendant school district to rebut such. See: *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706, 720 (N.D. Miss. 1971) which adopts the "clear and convincing" standard. In accord: *Armstead* v. *Starkville Municipal Separate School District*, 325 F.Supp. 560, 570 (N.D. Miss. 1971); *Williams* v. *Kimbrough*, 295 F.Supp. 578, 585 (W.D. Louisiana 1969). See also: *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 192 (4th Cir. 1966); *North Carolina Teachers Association* v. *Asheboro City Board of Education*, 393 F.2d 736, 743, f.n. 11 (4th Cir. 1968); and *Moore* v. *Board of Education of Chidester School District No. 59*, 448 F.2d 709 (8th Cir. 1971).

By analogy, this Court has recognized that, once the Plaintiff has established a prima facie case of segregation

in the context of school desegregation matters (whether classical or otherwise), a school board must rebut the inference of illegality through clear and convincing evidence. See: *Keyes* v. *School District No. 1,* 413 U.S. 189, 209, 93 S.Ct. 2686, 37 L.Ed.2d 548, 564 (1973), citing certain of the foregoing authority in support of said proposition. See also: *Reynolds* v. *Abbeville City School District No. 60,* 554 F.2d 638, 642 (4th Cir. 1977), where the Court, citing *Keyes, supra and Washington* v. *Davis,* 426 U.S. 229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (dictum), writes:

> "It is also well established that, in a school system with a history of segregation, terminating a disproportionate number of black faculty raises an inference of discrimination. The school authorities must rebut the prima facie case by showing through clear and convincing evidence that permissible, racial neutral selection criteria governed their conduct. Keyes v. School District No. 1, 413 U.S. 189, 209, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1966); see Washington v. Davis, 426 U.S. 229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (dictum.")*

* See also: *Day* v. *Mathews,* 530 F.2d 1083, 1085-1086 (Ct. of Appeals, D.C. 1976) where the Court wrote in a similar vein in a Title VII matter:

> "They establish unequivocally that a prima facie showing of discrimination shifts the burden to the employer to prove that the employee (or applicant) would not have gotten the post in any event, even absent discrimination. See EEOC v. Detroit Edison Co., supra, 515 F.2d at 259-260; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1374-1375, 1380 (5th Cir. 1974). Cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). And those courts which have given the most careful consideration to the burden of proof question have held that the employee must prevail unless the employer proves its case by 'clear and convincing evidence.' Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444-445 (5th Cir.), cert. denied, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974); Pettway v. American Cast Iron Pipe Co., supra, 494 F.2d at 259-260; Johnson v. Goodyear Tire & Rubber Co., supra, 491 F.2d at 1374-1380; Cooper v. Allen, 467 F.2d 836, 840 (5th Cir. 1972).
>
> The reason for this is straightforward. 'Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude.' Johnson v. Goodyear Tire & Rubber Co., supra, 491 F.2d at 1379. Such a showing is impossible precisely because of the employer's unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem." (Footnotes omitted.)

While there are distinguishing facts between the cases just cited and the instant case, such are not significant enough to cancel out the common applicability of the legal principle to all civil rights actions wherein there has been alleged deprivation of rights because of racial considerations and those racial considerations have been clearly and convincingly documented in the prima facie case. See: *Hardy* v. *Porter,* 443 F.Supp. 1164, 1171 (N.D. Miss 1977), citing *Keyes* notwithstanding the factual dissimilarities.

Petitioner submits that, in light of the difficulty in establishing a deprivation of rights based on race, once she established a "prima facie" case of discrimination pursuant to the requirements enunciated in *McDonnell Douglas Corp.* v. *Green, supra,* including therein uncontradicted documented evidence that the only reported considerations at the time of the adverse employment decision were racial, not only does she have the right to demand and to be shown that race was not a criterion in refusing to retain her but she also has the right to demand and to be shown such in a "clear and convincing manner." It is precisely because of the difficulty in proving racial discrimination that this Court has seen fit to shift the burden from the employee to the employer once the employee has established a "prima facie" case of discrimination; and it is precisely because of these factors that this Court must assure that the

employer does satisfy his burden in a "clear and convincing" manner once it is convincingly established in the prima facie case that the only reported considerations at the time of the adverse employment decision were race oriented in nature.

It goes without saying that few, if any, persons would admit that race was a factor in their consideration of the employment of a person let alone the sole consideration in that regard. Petitioner submits, however, that something more than silence in this regard (as in *Harris* v. *Jones*, 296 F.Supp. 1082 (D.C. Mass. 1969)—a housing discrimination matter) or a mere pronouncement that race was not a consideration or the sole consideration (as in *Smith* v. *Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970)—another housing discrimination matter) must be established in order for the Respondents to meet their burden satisfactorily. Addressing himself to this point, Judge Sobeloff stated in *North Carolina Teachers Association* v. *Asheboro City Board of Education, supra* at page 750:

> ". . . [I]t must be insisted that *bland assertions* by the School board that its decisions were free of racial considerations do not suffice to discharge its burden . . ." (Emphasis added).

Petitioner submits that the Court below was in error when it found that the Respondents had satisfied their burden, once it shifted, in a clear and convincing manner, as they were required to do. The evidence in the Petitioner's case in chief, when contrasted against the bland assertions of non discrimination by the Respondents in their case along with their equally bland assertion that she was terminated because her teaching performance was less than adequate, without explaining reasonably, let alone convincingly, the nature of the ostensibly race-neutral criteria and

procedures utilized to evaluate the Petitioner's performance, without explaining the reason that a white person was accorded different evaluatory treatment, at least in the procedures applied, and without adequately explaining the reason that no reference is made of her unsatisfactory work or alleged incompetence in the summary of the minutes of the evaluation meeting, can only lead reasonable people to conclude that, as a matter of law, the Respondents failed to satisfy their burden, notwithstanding their articulation of race neutral criteria as the reasons for their decision and action (two years after the decision and action).

2. This Court has never determined whether the mere articulation of race neutral criteria, without more, meets the employers burden once it has shifted from the employee to the employer and where the Black professional's Title VII prima facie case of individually oriented racial discrimination establishes that the only evidentially documented factors discussed at the time of the adverse employment decision were race oriented.

Where a Black professional's Title VII prima facie case of individually oriented racial discrimination establishes that the only evidentially documented factors discussed at the time of the adverse employment decision were race oriented, the mere articulation of race neutral criteria, without more, does not meet the University employer's burden, once it has shifted from the employee to the employer when, as here, there is no evidential validation of the criteria and, in fact, there is evidence by the Respondents own witnesses, in addition to that of Petitioner's own witnesses, that the subjective evaluation of a student's work, one of the two race neutral criteria articulated, was not a valid criteria upon which to measure the competence of a teacher; when there is no evidentially established philosophical or other criteria upon which the Petitioner

was required to pursue her course study and when, in fact, those who had seen her teach and otherwise discussed her efforts with her found her teaching to be satisfactory.*

Certainly, where, at best, there is contradictory evidence within the employer's own case as to the validity of the evaluating crieria (as there is herein), the inference of racial discrimination attendant to the Petitioner's Title VII prima facie case of individually oriented discrimination cannot be rebutted by said race neutral criteria, particularly when, as here, the evidence does not establish a comparative use of that criteria in other instances and when the evidence establishes that a white individual, being evaluated contemporaneously with the Petitioner, was afforded different procedural amenities and the University Senate Subcommittee on Academic Freedom made a finding of the same, with recommendations for relief which were ignored by the Respondents (without reason therefor).

In light of the established principle that "it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem", See: *Day* v. *Mathews, supra* at page 1086, in light of the principle "that comparative data lies at the heart of a rebuttal of prima facie case of employment discrimination", See:

* The only other race neutral criteria enunciated by the Respondents, as an unreported/post decisional justification for their decision and action, was that the School of Architecture was changing its philosophy and proposing to hire only architectural degreed individuals. However, the uncontradicted evidence shows that, subsequent to the Petitioner's termination, a white, non architectural degreed individual was, in fact, hired, possessed the very same academic credentials which the Petitioner possessed, and taught the very same course which the Petitioner initially taught. Moreover, the uncontradicted evidence shows that white males with non architectural degrees are presently on the faculty in the School of Architecture and, in some cases, have tenure.

East v. *Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975); See also: *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977), and in light of "the principle placing upon a party the burden of proving facts peculiarly within its own knowledge", See: *Day* v. *Mathews, supra* at page 1086, note five (5) citing *United States* v. *New York, N.H. & H.R. Co.*, 355 U.S. 253, 256, n.5, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957), this case represents a question of tremendous public importance since it otherwise leaves a University employer free to merely articulate post decision race neutral criteria, without more, notwithstanding that the documented evidential record (including evidence that the only reported considerations at the time of the adverse decision were racial), requires that a prima facie case be found under the principles enunciated by this Court in *McDonnell Douglas Corp.* v. *Green, supra.*

3. This Court has never determined whether invalid race oriented considerations are cancelled out by the subsequent assertion of ostensibly race neutral criteria, without more.

The majority of Circuit panel below held that, notwithstanding the District Court's conclusion otherwise, the Petitioner did establish a prima facie case of individually based racial discrimination, under Title VII of the Civil Rights Act, in accordance with the requirements enunciated by this Court in *McDonnell Douglas Corp.* v. *Green, supra.*

In substance she established that she is a Black person; that she was hired because, among other reasons, she is Black and pursuant to an Affirmative Action effort by the Dean of the School of Architecture; that she was clearly competent, by background, to teach the courses which she was assigned to teach; that she was involved in the School of Architecture; that she did perform competently, as a teacher, generally; that the only recorded discussion about her retention on the faculty, at the time she was being

reviewed and until the testimony given at the State Division of Human Rights, focused around race oriented matters and her personality (with attendant racial overtones); that a white, non tenured woman was accorded greater opportunity in the evaluation process by the faculty; that the University Senate Committee found that the evaluation process accorded to the Petitioner was improper and communicated the same to the Respondents with the recommendation that the Petitioner be retained in her position; and that the Respondents refused to even respond to the Senate finding and recommendation let alone implement it (See: Exhibit #'s 17, 19, 20 in the Record below, set forth herein, *infra*, as Appendix E).

It goes without saying that, if at the evidentiary hearing before the New York State Division of Human Rights (upon which the case herein was submitted to the trial court below) there had been no race neutral reasons articulated by the Respondents as a basis for their decision to terminate the Petitioner, the Court below, having found that the Petitioner made out a prima facie case, would have been required to find, as a matter of law, that the reason for her termination was racially based and oriented (See: Exhibit # 14 in the Record below, set forth herein, *infra*, as Appendix D, which is the minutes of the student-faculty committee meeting whereat the Petitioner's employment status was discussed and wherein the only references to the Petitioner focus on race and personality oriented factors). See: *Flowers* v. *Crouch-Walker Corp., supra*, footnote for (4) at page 1283. None of the subsequent race neutral reasons given by the Respondents at the evidentiary hearing two years after the termination are referred to in the minutes of said meeting.

Merely because the Respondents articulated race neutral reasons for their decision (two years after the decision)

does not cause the race oriented reasons to disappear. They are unrebutted; and they are part and parcel of the evidentially documented reasons for the Petitioner's termination. Accordingly, her termination is racially infected and the racial infection cannot be expunged even by incorporation therein of otherwise valid reasons (the Petitioner not conceding that, in fact, the ostensibly race neutral reasons articulated by the Respondents, subsequent to the termination, are valid but rather asserting that they were pierced by and through additional testimony).

As in the area of housing discrimination under 42 U.S.C. Section 1982 (the Civil Rights Act of 1866), so too in the area of employment discrimination, under both 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. Section 2000(e) *et seq.*), race can be neither the sole consideration nor even a partial consideration in refusing employment or otherwise terminating one from a job. See: *Brown* v. *Rollins, Inc.*, 397 F. Supp. 571 (W.D.N.C. 1974) (employment). *Smith* v. *Sol D. Adler Realty Co., supra* at pages 349-350 (housing); *Moore* v. *Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (housing); *Zuch* v. *Husey*, 394 F.Supp. 1028, 1047 (E.D. Mich. 1975) (housing); *Williamson* v. *Hampton Management Company*, 339 F.Supp. 1146, 1147 (N.D. Ill 1972) (housing); *Drain* v. *Friedman*, 422 F.Supp. 366, 370 (N.D. Ohio 1976) (housing); *Bishop* v. *Pecsok*, 431 F. Supp. 34, 37 (N.D. Ohio 1976) housing.

Once the burden of going forth with the evidence has shifted from the plaintiff to the defendant, the defendant must come forward with evidence to establish that race was neither the sole reason nor even a partial consideration in refusing to rent an apartment to a Black person. In applying the same principles herein, Petitioner submits that the Court below could have come to no other conclu-

sion but that the Petitioner was discriminated against by the Respondents because of her race in violation of her federally asserted rights since the evidence reflects that, if race and race-oriented criteria were not the sole reasons for terminating the Petitioner from her position, they were at the very least a significant part of the reason for terminating her (See: Minutes of December 1, 1973 meeting/Exhibit 14); and, thus, her termination was illegal. See: *Brown* v. *Rollins, supra,* a case concerning itself with discriminatory employment practices and, like the instant case, prosecuted under both the Civil Rights Act of 1866 (42 U.S.C. §1981) and the Civil Rights Act of 1964 as amended (42 U.S.C. Section 2000(e) *et seq.*). See also: *Cedeck* v. *Hamiltonian Federal Savings and Loan Association,* 414 F.Supp. 495, 498 (E.D. Mo. 1976), *Affirmed* 551 F.2d 1136 (8th Cir. 1977); *Sek* v. *Bethlehem Steel Corp.,* 421 F.Supp. 983, 993 (E.D. Pa. 1976), *Affirmed* 565 F.2d 153 (3rd Cir. 1977); *Gillin* v. *Federal Paper Board Co., Inc.,* 479 F.2d 97, 102 (2nd Cir. 1973) cited in *Saracini* v. *Missouri Pacific Rail Co.,* 431 F. Supp. 389, 395 (E.D. Mo. 1977), in the context of a sex discrimination claim. See also: *Sprogis* v. *United Airlines,* 444 F.2d 1194, 1198 (7th Cir. 1971), *Cert. denied* 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971); *Equal Employment Opportunity Commission* v. *Kallir, Phillips, Ross, Inc.,* 401 F.Supp. 66, 72, footnote 17 (S.D.N.Y. 1975).

Consistency would require that, if as a matter of law racial factors are impermissible considerations in a housing discrimination case brought under 42 U.S.C. Section 1982 (notwithstanding the existence of otherwise permissible considerations), so too, in an employment discrimination case brought under 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000(e) *et seq.,* racial considerations are impermissible even if they were not the sole considera-

tions; and, therefore, an adverse decision against an employee or potential employee would be terminally infected and legally impermissible where, as in the instant case, race was a factor (in a negative vein) even if not the sole factor behind the challenged action.

In light of the fact that, at the time the decision herein was made the only evidentially documented references are to racial criteria (and personality characteristics with racial overtones), it is submitted that the ultimate termination is necessarily racially infected notwithstanding the subsequent articulation of race neutral criteria.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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(212) 245-2100

Attorneys for Petitioner

By: .....

September 29, 1978

Certificate of Service

JAMES I. MEYERSON, Esq., one of the attorneys for the Petitioner herein, certifies that on the 29th day of September, 1978, I did serve three copies of the foregoing Petition upon the attorneys for the Respondents by mailing the same, postage prepaid, first class, as follows:

William Fitzpatrick, Esq.
Bond Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

Respectfully submitted,

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Attorney for Petitioner

By: .....

Appendices

Appendix A

Opinion of the United States District Court for the Northern District of New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
77-CV-588

GERALDINE POWELL,

Plaintiff,

v.

SYRACUSE UNIVERSITY, an educational corporate entity, DOCTOR MELVIN EGGERS, Chancellor of Syracuse University, SCHOOL OF ARCHITECTURE, a sub-unit of Syracuse University, JULIO SAN JOSE, Acting Dean of the School of Architecture, Syracuse University,

Defendants.

APPEARANCES:

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Of Counsel

EDMUND PORT, *Judge*

Appendix A

MEMORANDUM-DECISION AND ORDER

I. Nature of the Proceeding

Geraldine Powell, a black woman, is suing Syracuse University (SU), charging unlawful job discrimination on the basis of race and sex.[1] Plaintiff was hired for one year to teach in the SU School of Architecture part-time. Her contract was renewed for a second year, but at the end of that year she was not rehired. She alleges that the termination of her employment was racially and sexually motivated, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981.

Defendants are Syracuse University, the SU School of Architecture, Melvin Eggers, Chancellor of the University, and Julio San Jose, Acting Dean of the School of Architecture.

II. Background

The faculty of the SU School of Architecture voted not to renew plaintiff's contract in December of 1973. Her contract expired and her teaching obligations ended after the 1974 spring semester. On May 31, 1974, she filed a claim of discrimination based on race, color and sex with the New York State Division of Human Rights. After six days of hearings, the Division of Human Rights rendered a decision in defendants' favor on November 25, 1975. In the meantime, as is required by Title VII, 42 U.S.C. § 2000e-5(f)(1), plaintiff filed a complaint with the Equal

[1] The complaint at all times mentions discrimination on the basis of both race and sex. At the hearing which became the bulk of the record before this court, plaintiff seemed to argue racial discrimination only. Similarly, plaintiff's brief deals only with racial discrimination. This decision, however, will treat plaintiff's claim as alleging both racial and sexual discrimination.

Appendix A

Employment Opportunity Commission (EEOC). In September of 1975, plaintiff received her right to sue letter from the EEOC. Thus, all possible administrative remedies have been exhausted.

Plaintiff's complaint was filed on December 15, 1975. Initially, she based her job discrimination claim on Title VII only. Defendants answered and raised the 90 day statute of limitations of Title VII as a defense. Plaintiff then moved to amend her complaint to state a claim under 42 U.S.C. § 1981 also. The motion was granted by the Honorable Henry F. Werker, United States District Judge for the Southern District of New York, who was sitting in this district by designation.

Following discovery, the parties entered into a stipulation submitting the case upon the transcript of plaintiff's administrative hearings before the New York State Division of Human Rights, stipulated facts and exhibits, and the parties' briefs.

III. Facts

Plaintiff has a varied education and employment background. She was an art major in high school but studied nursing at New York University, graduating with a Registered Nurse's degree in 1959. Several years later she returned to college and received a Bachelor's of Fine Arts from SU in 1971. Her schooling at SU continued and she ultimately received a Master's of Fine Arts in Environmental Design early in 1973. (Transcript of March 6, 1975, hearing (3/6 Tr.) at 23-24; Exh. 1). Her Master's thesis concerned the relationship of low income housing to black studies in Syracuse. (3/6 Tr. 24).

While still working toward her Master's, plaintiff heard that John Fisher, Dean of the SU School of Architecture,

was trying to recruit black women for the faculty of that school. (3/6 Tr. 31). Dean Fisher explained that he was attempting to implement an affirmative action program in the School of Architecture. (Transcript of January 7, 1975 hearing (1/7 Tr.) at 8). As a result of this program, minority student enrollment in the School of Architecture increased dramatically during Fisher's tenure as Dean.[2]

In April of 1972 Fisher interviewed plaintiff for a position on the Architecture faculty. (3/6 Tr. 32-36). Plaintiff testified that Fisher was favorably impressed with her artistic portfolio. (*Id.*). Fisher thought that plaintiff would have her Master's degree by the fall of 1972.[3] (1/7 Tr. 55). Despite plaintiff's lack of any architecture background and despite the fact that she had never before taught in a university (*Id.*), Fisher hired plaintiff to teach basic design for the academic year 1972-73. She was given the position of part-time lecturer at an annual salary of $3,000. (Exh. 5).

In the fall of 1972 plaintiff began teaching basic design. She taught one class of 17 students which met twice a week for three hours. (3/6 Tr. 40; Exh. 43). Basic design is described in the School of Architecture's catalog as an introduction to design—an attempt to teach both the perception and depiction of perspective, proportion, color and geometry. (*See* Exh. 24). In the curriculum, basic

[2] When Fisher came to SU in 1971, there were only two black students in the School of Architecture. He testified that the enrollment of blacks grew to 34, and the total minority enrollment to 63, by the 1974-75 school year. Transcript of March 20, 1975 hearing (3/20 Tr.) at 76. The stipulated facts indicate that the black student enrollment for the year 1974-75 was actually 29. Stipulated Facts ¶7.

[3] Plaintiff received her Master's early in 1973. Exhibit 1; *see* 1/7 Tr. 54.

design serves as the first of many design courses which the student takes throughout his or her study of architecture. (1/7 Tr. 22, 44-45; Exh. 24).

During her first semester, plaintiff received no criticism from other faculty members about her teaching. She testified that she had no major problems with her new duties. (3/6 Tr. 42-43).

In the fall of 1972, before he ever saw any of her students' work, Dean Fisher was pleased with plaintiff and her attitudes towards teaching. (Transcript of June 19, 1975 hearing (6/19 Tr. 651). He met with her in December to discuss her future in the School of Architecture. (3/6 Tr. 45). Fisher was interested in promoting plaintiff to a full-time position. (Transcript of March 20, 1975 hearing (3/20 Tr. 88). The Dean foresaw plaintiff teaching half-time and working in a community development program for the other half. (*Id.* at 91). This promotion was contingent both on budgetary increases and on a Yale professor coming to SU to run the community development program. (*Id.* 90. 93). Plaintiff, however, construed the Dean's suggestions as an offer (3/6 Tr. 45), which she requested to be put in writing. (*Id.* at 47).

The plaintiff did not receive the promotion mentioned by the Dean. First, the Yale professor chose not to come to SU (3/20 Tr. 95-96). Secondly, and more importantly, the School of Architecture's Committee on Appointments, Tenure and Promotion (Tenure Committee) met during the Spring of 1973 and voted not to expand plaintiff's teaching responsibilities. (*Id.* at 99; 1/7 Tr. 68). At that time the Tenure Committee met to review the work of all the basic design instructors. (3/6 Tr. 8). Plaintiff made a short presentation to the Tenure Committee. (1/7 Tr. 36). The committee, after evaluating plaintiff's teaching

performance (see *Id.* at 105-11), voted to continue plaintiff on the same level but with the condition that she not teach basic design. (*Id.* at 68). Fisher informed plaintiff that her position would not be expanded to full-time (3/6 Tr. 50) and that she would no longer teach basic design. (1/7 Tr. 69). Since fewer freshmen would be entering the school the next fall, fewer sections of basic design would be taught. (*See* Exh. 43). The Dean told plaintiff she would not be teaching basic design because of this decrease in enrollment (1/7 Tr. 69); he did not tell her that the Tenure Committee had voted not to continue her for basic design. (6/19 Tr. 633).

Despite the Tenure Committee's action, Fisher unilaterally promoted plaintiff to part-time visiting assistant professor. This promotion was accompanied by a raise in salary to $5,500.00 (3/20 Tr. 108-109), the same salary paid to all other part-time assistant professors. (*Id.* at 116). Thereafter, confusion developed about plaintiff's teaching responsibilities for the following year. After a discussion of the possibility of her teaching the history of non-western architecture, plaintiff began preparation for this course. The Dean then decided she would not teach this course but could serve instead as a guest lecturer. (3/6 Tr. 54-55; 3/20 Tr. 112). Finally, the terms for plaintiff's position the following year were ironed out. She would teach architectural rendering, deliver five guest lectures in non-western architecture,[4] and serve as minority student counsellor. (1/7 Tr. 70; 3/20 Tr. 112-114). Plaintiff's rendering course was only a two-credit course, as compared to three credits for basic design, so Fisher

[4] Although scheduled to give five lectures in non-Western architecture, plaintiff only delivered one and one-half lectures. 3/20 Tr. 114.

felt that the guest lectures made up for the decrease in hours taught. (*Id.*)

Rendering is a method of architectural drawing which attempts to represent a building in perspective as it will appear when constructed (3/20 Tr. 141). Rendering is not technical drawing for the building but, rather, a pictorial presentation of the building to a client. One faculty member testified that a rendering can attempt to portray the building photographically or, on the other hand, can try to convey something of the ideas or concepts embodied in the building's architecture. (Transcript of May 15, 1975 hearing (5/15 Tr.) 345-46). Professor Kermit Lee testified that rendering is a technically oriented architecture discipline (transcript of July 7, 1975 depositions (7/7 Tr.) 18), and Dean Fisher felt that it should only be taught by architects. (1/7 Tr. 43). Plaintiff and other faculty members disagreed though; they felt an artist could teach rendering. (*See* 3/6 Tr. 56-57; 3/20 Tr. 41).

In November of 1973, Dean Fisher told plaintiff that the Tenure Committee was again planning to review her work. (1/7 Tr. 72; 3/20 Tr. 123). Fisher wanted plaintiff to advance to full-time employment. (1/7 Tr. 73). On the Wednesday prior to Thanksgiving, he told her to submit a summary of her thesis and examples of the best work of her students to him. (7/7 Tr. 97). Although the Dean testified that he told plaintiff she had until December 1 to submit this material, (*Id.*), plaintiff was under the impression that she had only a couple days in which to complete her submission. (7/7 Tr. 100; 3/6 Tr. 76). She hand-wrote a summary of her thesis (*Id.*), and presented a random sampling of her students' work (7/7 Tr. 67). Plaintiff testified that she was unable to compile adequate

examples of her students' work because they were on Thanksgiving recess. (*Id.* at 66). She further testified that her students usually kept their good work but left their poorer work with her. (*Id.*). Despite these problems, plaintiff did not request a postponement of the meeting. (*Id.* at 98).

The Tenure Committee met to consider plaintiff's future on December 1, 1973. Nine members were present, Dean Fisher, six faculty members and two students. (Exh. 14). Fisher wanted to consider expanding plaintiff's position to full-time but the committee chose only to vote on continuation or termination of present positions. (1/7 Tr. 131-34). Professor VanKeuren, Chairman of the Tenure Committee, read the summary of plaintiff's thesis aloud. (1/7 Tr. 134; 3/20 Tr. 140). Discussion ensued about the subject of plaintiff's statement and about plaintiff generally. Examples of plaintiff's students' work were examined by all the committee members and a vote was taken by secret ballot. The vote was eight to one against continuing plaintiff in the School of Architecture. (Exh. 14). Dean Fisher cast the lone vote in plaintiff's favor. (3/20 Tr. 125).

All the eight committee members who voted against the plaintiff testified as to the reasons for their votes. Professor VanKeuren voted no, mainly on the quality of plaintiff's students' work, which he described as "extremely poor" (3/20 Tr. 145) and on cross-examination as "extraordinarily poor." (*Id.* at 176). Professor Skoler likewise voted no on the basis of the student work which he felt was unsatisfactory (*Id.* at 234), and not "of sufficient quality or standards as to support reappointment." (*Id.* at 213). Professor San Jose (now Associate Dean of the

School of Architecture) voted no for the same reason, the inadequacy of her students' work product, along with his impressions from the general discussion of plaintiff. (5/15 Tr. 343). Darrel Rippeteau, who was then a student in his final year at the School of Architecture, voted no on the basis of the "low level" of the students' work and his belief that the school should have a more qualified person teaching. (*Id.* at 271). Professor Gabriel voted no on the basis of plaintiff's background and her students' work. (6/19 Tr. at 461). Gabriel felt that, although faculty members need not be architects in order to teach, they should have some expertise in the area of their instruction. (*Id.* at 495-96). John Livengood, who was a fourth year architecture student at the time, voted no because of plaintiff's lack of qualifications to teach rendering. (*Id.* at 553). Professor Lee, the only black member of the Tenure Committee, voted against continuing plaintiff on the basis of her students' work, which he felt was not sufficiently developed to permit them to continue their architecture education, (7/7 Tr. 11, 22), and on the basis of his observations of plaintiff's studio. (*Id.* at 26). Finally, Professor Schueller voted no mainly on the inadequacy of plaintiff's background. He felt she was unable to strengthen the school's curriculum (*Id.* at 95), and also lacked the qualifications necessary to translate her design ideas into architectural design. (*Id.* at 91).

Each of the members of the Tenure Committee testified that his vote was not influenced by racial or sexual discrimination. This testimony is credited along with the reasons articulated by the committee members for their negative vote. Cross-examination was unable to reveal any suggestion of discriminatory motive on the part of any committee member. This finding accords with the Dean's

statement that the committee did not consider plaintiff in terms of her color. (1/7 Tr. 159-160). The criteria used to evaluate plaintiff were relevant to the decision before the committee and were not applied differently to plaintiff than to other faculty members.

Plaintiff infers discrimination from the result of the vote. (3/6 Tr. 102-04). She contends that the committee discussion questioned the existence of "black architecture" (*See* Exh. 14) and thus considered her in a racial setting. This discussion, however, was in response to plaintiff's submitted statement which postulated the existence of a "black aesthetic" and called for recognition of a black perspective for understanding the needs of the black community and black students. Any committee discussion which then made reference to race followed naturally from the reading of the statement. After plaintiff injected the question of black values into the committee's consideration of her, she should not expect them to ignore the ideas she presented.

Plaintiff also infers discrimination from different treatment which was afforded other faculty members. Consideration of Ursula Lesnikowski, another part-time faculty member, was deferred to another meeting, (*See* Exh. 14); however, her vote was deferred because of insufficient material on which to judge her. (5/15 Tr. 302). In contrast, plaintiff had submitted sufficient material; unfortunately the committee judged it to be inadequate. Furthermore, plaintiff was not the only faculty member terminated at this meeting. David Allor, a white male (*See* Exh. C), was also terminated. (Exh. 14).

Plaintiff also challenged the committee's decision by introducing testimony of other faculty members who felt

that plaintiff should not have been terminated. Such testimony only raises a difference of opinion with the committee's conclusion, however, and does not provide any evidence or even suggestion of discrimination. Professor Snyder judged plaintiff's performance teaching basic design as average (3/20 Tr. 17) or adequate (*Id.* at 34). Professor Richards felt that she was a capable artist and that the work of her students was adequate. (*Id.* at 41). Also, Dean Fisher testified that plaintiff's work was satisfactory, minimally acceptable.[5] (3/19 Tr. 620). These opinions might have been relevant to the Tenure Committee's evaluation, but they are not relevant to the issues in this suit. Certainely, this praise of plaintiff, if it can be called that, is not so unqualified as to raise an inference of improper motive when the Tenure Committee voted against her.[6]

Finally, it should be pointed out that, on the few occasions when plaintiff received special treatment, whether or not related to her race and sex, she was always treated favorably. Dean Fisher obtained remitted tuition for her although, as a part-time faculty member, she was not entitled to this benefit. (6/19 Tr. 605; Exh. 6), The Dean also testified that, in his opinion, had plaintiff not been a black woman, she would not have been rehired for a second year. (1/7 Tr. 173-74; 6/19 Tr. 621-22).

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[5] Fisher had been very encouraging to plaintiff during her first semester at the School of Architecture, but when he eventually saw the work of her basic design students, he admitted that he was disappointed. 6/19 Tr. 651.

[6] Favorable references of plaintiff written by Dean Fisher, *see* Exhs. 8, 12, do not support plaintiff's case. They were irrelevant to the Tenure Committee's consideration of plaintiff, 1/7 Tr. 79, and were only natural in view of the Dean's efforts to help plaintiff's career.

Appendix A

After the December 1 meeting of the Tenure Comittee, Fisher called the plaintiff and relayed the bad news.[7] (3/6 Tr. 77). He told her that he thought the committee thought her too "nationalistic." (1/7 Tr. 148). Fisher testified, however, that he was upset over the vote and was guessing why the committee had rejected her. (*Id.* at 149). Although this offhand remark appears to have provided the seed for much of the case argued by plaintiff's attorneys, it is unsubstantiated by the other evidence and is discounted in view of the Dean's advocacy in plaintiff's favor before the Tenure Committee.

Fisher asked plaintiff for a letter of resignation, which she refused to tender. (3/6 Tr. 77). She appealed the Tenure Committee's decision to the Subcommittee on Academic Freedom which found no suggestion of discrimination but did feel that the review of plaintiff's position may have been improper. (See Exh. 16, 17). It suggested offering plaintiff another position. Dean Fisher did not agree with the conclusions of the Subcommittee on Academic Freedom and refused to adopt its recommendation. (Exh. 22). In May of 1974, plaintiff received a letter of termination. (Exh. 21).

Plaintiff filed timely complaints with the New York State Division of Human Rights and the EEOC. After receiving her right to sue letter, she commenced this action. The complaint demands declaratory judgment of the violation of plaintiff's rights, injunctive relief against future discrimination, reinstatement, back pay, $200,000.00 actual and punitive damages, and costs and attorneys' fees.

[7] Some time in December, at a meeting of the Student Faculty Board, Fisher moved that the Tenture Committee's recommendation to terminate plaintiff not be adopted. His motion was defeated. 6/19 Tr. 618.

Appendix A

IV. Contentions

Plaintiff contends that she was fired because of her race and sex. She argues that she was qualified for the faculty positions she held, that SU later hired white persons with similar qualifications for the same positions and that the reasons expressed by the Tenure Committee in voting to terminate her are not legally sufficient to uphold her termination.

Defendants answer that plaintiff has presented no evidence of discriminatory motive behind her firing. They argue that the reasons expressed by the members of the Tenure Committee in voting against retaining plaintiff are valid and related to their legitimate concerns for the quality of the faculty. Moreover, defendants argue that the courts must be especially cautious about second-guessing university decisions which relate to faculty hiring and firing.

V. Title VII Jurisdiction

One of the defenses in the defendants' answer is that the action is barred by reason of plaintiff's failure to commence it within 90 days of the receipt of her right to sue letter. However, the defendants do not argue the point in their brief. Nevertheless, because a question of jurisdiction is involved, *see DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306 (2d Cir.), *aff'd as modified*, 520 F.2d 409 (2d Cir. 1975), it is incumbent upon me to consider this question, sua sponte.[8]

[8] Plaintiff has amended her complaint to allege a claim under 42 U.S.C. § 1981. The complaint was filed and amended well within the three year statute of limitations for § 1981 claims. *Goss* v. *Revlon, Inc.*, 548 F.2d 405 (2d Cir. 1976). Nevertheless, because Title VII and § 1981 are independent remedies, *see Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), and because the

The question of jurisdiction arises against this factual background. The EEOC sent a form right to sue letter to the plaintiff by registered mail. Plaintiff received the letter on September 10, 1975, thereby requiring her to commence her action within 90 days of that date. 42 U.S.C. § 2000e-5(f)(1). On December 4, 1975, well within the 90 day period, the Clerk of the Court at Utica, New York received from the plaintiff's attorney the original and copy of the complaint in this action, together with a proposed summons and $15.00 filing fee. Instead of filing the complaint by affixing his filing stamp, he returned the summons, complaint and filing fee to plaintiff's attorney with a form letter requesting plaintiff to complete Form 44a, Civil Cover Sheet, and a USMS Form 285 for each defendant, Marshal's Service of Process forms, pursuant to Rule 9(h) of the General Rules for the United States District Court, Northern District of New York (local rules). He also advised counsel that the local rules require designation of counsel within the district for service of papers.

In order to meet the requirements imposed by the Clerk, counsel filed the papers jointly pro se with the plaintiff and designated her address within the district for the service of papers. Healso completed and returned the other summons submitted to him, together with the forms and the filing fee. As a result of the time consumed by these maneuvers, the complaint appears to have been filed formally on December 15, 1975, outside the 90 day period.

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necessary proof for a § 1981 claim differs from that for a Title VII claim, see *Washington* v. *Davis*, 426 U.S. 229 (1976), consideration of this jurisdictional question is appropriate.

Without faulting the Clerk for strictly adhering to Rule 9 of the local rules, I regard the omission to supply the additional information requested by the Clerk as an irregularity and not a matter of substance affecting the time of filing.

Under the circumstances disclosed herein, I find that the complaint was filed when it was received by the Clerk with the filing fee on December 4. "The lodging of a petition with the Clerk to be 'filed' by him is a 'filing'." *United States* v. *Missco Homestead Ass'n., Inc.*, 185 F.2d 283, 285 (8th Cir. 1950); *see also Freeman* v. *Giacomo Costa Fu Andrea*, 282 F. Supp. 525 (E.D. Pa. 1968). The requirement that a complaint be filed within 90 days has been liberally construed in order to effect the general purposes of Title VII. *See Houston* v. *General Motors Corp.*, 477 F.2d 1003 (8th Cir. 1973) (permitting a complaint to be filed outside the statute when the right to sue letter had been filed within). *See also Moshos* v. *District Council of New York*, 386 F. Supp. 21 (S.D.N.Y. 1974). The principle was succinctly stated in *Weiss* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975):

> [A]lthough compliance with these requirements is a jurisdictional prerequisite to maintenance of a civil action. . . . the rigid insistence on meticulous observance of technicalities unrelated to any substantive purpose is inappropriate.

Id. at 412. (citations omitted). The defense of lack of jurisdiction is therefore without support.

VI. No Title VII Violation

The starting point for analysis for any job discrimination claim under Title VII is *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . .
>
> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

Id. at 802. If defendants succeed in establishing a legitimate ground for their action, the burden returns to the plaintiff, this time "to show that [defendants'] stated reason for [plaintiff's] rejection was in fact pretext." *Id.* at 804.

When job discrimination is alleged by an unsatisfied university faculty member, *Faro* v. *New York University*, 502 F.2d 1229 (2d Cir. 1974) teaches that:

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally" (Applt's Br. p. 26). . . . Such a procedure,

> in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful.

Id. at 1231-32.

Application of *Faro* indicates the plaintiff has failed to establish a prima facie case under Title VII. Two elements of her case are unquestionably established. Plaintiff is a member of a racial minority and she has been rejected,[9] in this case, terminated from her position. Yet plaintiff must also show that she was qualified for the faculty position which she held and that, after her termination, her position was filled by another teacher of equivalent qualifications. *McDonnell Douglas, supra,* 411 U.S. at 802.

Dean Fisher testified that, generally, a degree in architecture is a prerequisite to teaching in the School of Architecture. (1/7 Tr. 40-41). Exceptions are made, however, for persons teaching history of architecture, computer applications to architecture, and community development. (*Id.*) The record also reveals that some of the basic design teachers had no architecture degree. (*Id.* at 42; Exh. B). Despite these facts I would ordinarily hesitate to

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[9] The plaintiff in *McDonnell Douglas* had been laid off in a general reduction of defendant's work force. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 794 (1973). Following a series of civil rights demonstrations, plaintiff sought to be rehired, when defendant advertised of job openings. Defendant refused to rehire him and he sued. *Id.* at 796. The language of the *McDonnell Douglas* test is, therefore, couched in terms of application for employment and rejection. The same test applies, though, to situations of illegal firing, and the language of the test is adapted herein to that situation. *See* Id. at 802 n. 13; 42 U.S.C. § 2000e-2 (a)(1).

evaluate plaintiff's qualifications to teach on the architecture faculty. The question of qualifications itself is perhaps best left to the university under *Faro. See Labat* v. *Board of Higher Education of the City of New York,* 401 F. Supp. 753, 756 (S.D.N.Y. 1975). Nevertheless, plaintiff was hired by Dean Fisher and was rehired once after appearing in front of the Tenure Committee in the spring of 1973. Under these circumstances, I will assume arguendo, plaintiff has established, for purposes of her prima facie case, that she was qualified for the job.[10]

The same conclusion cannot be reached, however, when plaintiff attempts to prove that she was replaced by teachers of the same qualifications. After plaintiff was terminated, SU hired Professor Gray to teach architectural rendering. His two degrees, including a Master's, were both in architecture, contrasted with plaintiff's degrees in fine arts. He also had teaching experience. (3/6 Tr. 20). Gray's background in architecture precludes any finding of equivalent qualifications. Plaintiff also points to two white women who were hired subsequent to her termination, and claims that these women replaced her on the architecture faculty. MaryAnn Smith was hired in the fall of 1974 to teach History of Architecture. (Stipulated Facts Exh. B). Plaintiff had never taught History of Achitecture, however.[11] The other woman, Martha Dwyer, was hired in the fall of 1975 to teach Basic Design. *(Id.).* Since Dwyer was hired to teach Basic Design over two years

[10] This conclusion may seem anomalous in view of her subsequent firing, which did not violate either Title VII or § 1981. Plaintiff, however, could appear to be qualified on the basis of her background yet be deficient when tested by actual performance.

[11] Furthermore, Smith had a Doctorate in Architectural History precluding a finding of equivalent qualifications with plaintiff. (Stipulated Facts Exh. B).

after the plaintiff ceased teaching that course, no finding that Dwyer was replacing plaintiff on the faculty is justified.

Plaintiff is unable to show that after she was fired, she was replaced by someone of equivalent qualifications. She therefore has failed to prove her prima facie case.

However, assuming arguendo, the establishment of a prima facie case, the burden would shift to defendants "to articulate some legitimate, nondiscriminatory reason for [plaintiff's termination]." *McDonnell Douglas, supra,* 411 U.S. at 802. Defendants have met this burden.

A contract for the academic year 1974-75 was not offered to her for one reason only. The Tenure Committee honestly reached the conclusion that plaintiff's performance fell short of teaching requirements, after affording her a fair opportunity to demonstrate her teaching ability. This determination was devoid of any racist or sexist base. The plaintiff has not demonstrated the assigned reason to be a pretext for prohibited discriminatory conduct. All of the eight members of the Tenure Committee who voted against plaintiff testified that they voted to terminate plaintiff essentially because of the poor work product of her rendering students, and her inadequate architectural background. These are matters of obvious concern to the architecture faculty and, therefore, are unquestionably legitimate reasons for the vote.

Plaintiff raises a number of attacks on the validity of the Tenure Committee's vote. The main one concerns the alleged lack of valid objective criteria by which the Tenure Committee could evaluate plaintiff. The stipulated facts disclosed that prior to 1975, no written guidelines existed for the regulation of tenure and promotion decisions within the School of Architecture. (Stipulated Facts ¶¶ 37-44).

Likewise, prior to the fall of 1974 no document existed which set forth "the philosophy and basic approach of School of Architecture" concerning the teaching of rendering or basic design. (*Id.* ¶¶ 52-58). Absent such objective written guidelines, plaintiff contends that the committee was left with only its subjective judgment and was, therefore, unable to reach a valid decision. Plaintiff next contends that the committee failed to consider that her rendering students were poor students and that, consequently, their poor work was no reflection on her adequacy as a teacher. She further argues that no consideration was given to any improvement of the work of the students which had occurred under her guidance. Also, the qualifications of some of the committee members to judge her work are challenged.

The simple answer to all these arguments is that they are beyond this court's purview. The issue in this case is whether or not the defendants acted discriminatorily. The institution of a law suit does not transform the court into the Tenure Committee. These challenges should be addressed to the academicians.[12] Respect for academic freedom and concern for the integrity and quality of higher education have created great reluctance in the courts about interfering with these university decisions. *See Faro* v. *New York University*, 502 F.2d 1229 (2d Cir. 1974); *State Division of Human Rights* v. *Columbia University*, 39 N.Y.

[12] Plaintiff's argument that the Tenure Committee was per se unable objectively to evaluate plaintiff without written standards is specious on its face. Historically, it is absurd to suggest that, for over 100 years, the School of Architecture was unequipped to choose its faculty properly. Conversely, any suggestion that mere written criteria enhance either the objectivity or propriety of a tenure decision gives undue respect to the formality of putting words on paper.

2d 612, 385 N.Y.S.2d 19 (1976), *cert. denied*, 45 U.S.L.W. 3571 (February 22, 1977). A court should be extremely reluctant to evaluate any faculty's ability to promote and tenure its own members, especially when it lacks any expertise concerning either the specialty of that faculty, here architecture, or the field of educational administration generally.

Plaintiff next argues that her firing was racially discriminatory because she was hired, in part, on account of her race, yet was not thereafter properly trained for the job; never told of any criticism of her work; nor given proper help. Relying on the district court opinion in *Long* v. *Ford Motor Co.*, 352 F. Supp. 135 (E.D. Mich. 1972), *rev'd*, 496 F.2d 500 (6th Cir. 1974),[13] plaintiff contends the failure to train her adequately, under these circumstances, is a violation of Title VII. *Long*, however, held failure to train was actionable only if plaintiff could show treatment dissimilar from that given white persons or similar on its face yet dissimilar in effect. In the case at bar no such showing has been made. Plaintiff has failed to demonstrate that any new faculty members were treated differently or given any more guidance or supervision. Implicit in plaintiff's argument is the suggestion that the School of Archi-

[13] The district court held that merely hiring a black person for a given job does not provide equal employment opportunity. Assuming inadequacies in their education and background, black people need adequate job training. "If these people are not given adequate job training and are, as a result, terminated, then unequal employment opportunity still results." *Long* v. *Ford Motor Co.*, 352 F. Supp. 135, 140 (E.D. Mich. 1972). It is highly doubtful that any such principle would be applicable to the case at bar. The position of a university professor is very different from those positions for which Long was hired, production foreman and wage analyst.

tecture is obligated to train its faculty members. This suggestion is untenable.[14]

Plaintiff lastly argues that, to the extent her termination was based on her inadequate architectural background, defendants effectively are foreclosing black women from teaching on architecture faculties. Statistics indicate that there are presently very few black women who are practicing architects within the United States. (*See* Exh. 42). Therefore, if an architecture background is a prerequisite to teaching, most black women are kept off the faculties of architecture schools. This argument misstates the facts of the case. Plaintiff was given the opportunity to teach on the SU architecture faculty, despite the absence of any architecture background. Other faculty members without an architecture background have managed to teach successfully and obtain tenure. When plaintiff was ultimately terminated, the major criticism voiced by the members of the Tenure Committee was the unsatisfactory work of her students. Having been provided with the opportunity to teach, plaintiff did not meet the standards of the architecture faculty. The law does not guarantee plaintiff a position on the faculty. It only entitles her to nondiscriminatory treatment. *See Logan* v. *St. Luke's Hospital Center*, 428 F. Supp. 127, 130 (S.D.N.Y. 1977). Here, where the School of Architecture provided plaintiff with the opportunity to teach, it certainly cannot be charged with foreclosing black women from serving on the faculty.

[14] There is no disagreement with the notion that all faculty members must be treated equally. If some are trained for their job by the School of Architecture, all must be trained without regard for race or sex. *See Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974). Rather, objection is raised with plaintiff's argument that the school is obligated to train its faculty in skills they already should possess.

In conclusion, I find that defendants' reasons for terminating plaintiff were legitimate, nondiscriminatory, and not a pretext for discrimination based on either race or sex. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *see Peters* v. *Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976). No violation of Title VII has been established.

VII. No § 1981 Violation

42 U.S.C. § 1981 "affords a federal remedy against discrimination in private employment on the basis of race." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460 (1975). In order to prove a violation of § 1981, plaintiff must meet a heavier burden than is required by Title VII. She must prove a racially discriminatory motive on the part of the defendants. *Washington* v. *Davis*, 426 U.S. 229 (1976). In this case, plaintiff has entirely failed to demonstrate racially discriminatory motive and, therefore, has failed to establish a violation of § 1981.

This Memorandum-Decision and Order shall constitute the court's findings of fact and conclusions of law. Fed.R. Civ.P. 52(a).

The court having jurisdiction of the subject matter and the parties hereto, for the reasons herein, it is

Ordered, that the plaintiff's complaint herein be and it hereby is dismissed; and it is further

Ordered, that a judgment dismissing plaintiff's complaint be entered by the Clerk of the Court.

Dated: August 5, 1977
Auburn, New York

/s/ Edmund Port
Senior U.S. District Judge

Appendix B

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 528—September Term, 1977.

(Argued January 18, 1978 Decided July 13, 1978.)

Docket No. 77-7490

GERALDINE POWELL,

Plaintiff-Appellant,

v.

SYRACUSE UNIVERSITY, et al.,

Defendants-Appellees.

Before:

MOORE, SMITH and MANSFIELD,

Circuit Judges.

Appeal from dismissal of Title VII civil rights action by minority teacher in the United States District Court for the Northern District of New York, Edmund Port, *Judge.*

Affirmed.

JAMES I. MEYERSON (N.A.A.C.P., New York, N.Y.), *for Appellant.*

Appendix B

DAVID N. SEXTON (Bond, Schoeneck & King, Syracuse, N.Y., William F. Fitzpatrick, of counsel), *for Appellees.*

SMITH, *Circuit Judge:*

Geraldine Powell, formerly a visiting assistant professor at the Syracuse University School of Architecture, appeals from a judgment of dismissal entered in the United States District Court for the Northern District of New York, Edmund Port, *Judge.* Judge Port found that, contrary to the appellant's contentions, the university had legitimate, nondiscriminatory reasons for terminating Ms. Powell's employment, and was accordingly not in violation of either Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* or 42 U.S.C. §1981. We find no error in the result reached by the court, and affirm the judgment.

I.

In December, 1973, Ms. Powell was informed by the dean of the Architecture School that her contract would not be renewed for the 1974-75 academic year. She subsequently filed a claim of discrimination based on race, color, and sex with the New York State Division of Human Rights. After hearings before an agency examiner, the Division of Human Rights dismissed the appellant's complaint for failure to prove that she was terminated from her employment, or denied equal terms, conditions, or privileges of employment, because of her race, color, or sex.[1] While

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1 The Division of Human Rights also found that appellant failed to prove that the university retaliated against her upon learning that she had filed a claim of discrimination.

the state complaint was pending, appellant filed a similar complaint with the Equal Employment Opportunity Commission ("EEOC"), receiving a right-to-sue letter on September 10, 1975.[2] She subsequently commenced this action within the 90-day period required by statute.[3] The case was submitted to the district court upon the transcript of hearings before the New York State Division of Human Rights, stipulated facts and exhibits, and the parties' briefs.[4]

II.

The findings of basic fact made by the district court are well supported by the record. Accordingly, we accept them for purposes of this appeal, and summarize them below.

Ms. Powell has an extensive academic background. She studied art in high school, but later changed fields, receiving a Registered Nurse's degree from New York University in 1959. In 1971, she received a Bachelor of Fine Arts degree from Syracuse University, and later was awarded the Master of Fine Arts degree in Environmental Design. Her master's thesis concerned the relationship of low income housing to black studies in Syracuse.

In April, 1972, appellant was interviewed for a teaching position by the Dean of the Syracuse University School of Architecture. Despite the fact that appellant had not yet

2 This letter was dated August 28, 1975.

3 The Office of the Clerk of the United States District Court received appellant's complaint on December 4, 1975. Because of bookkeeping technicalities, the complaint was not formally filed until December 15, 1975. The complaint was treated by the district court as timely filed. See Appendix at 12-14.

4 The complaint was subsequently amended to include a charge brought pursuant to 42 U.S.C. §1981.

earned her Master's degree, did not have any formal training in architecture, and had no teaching experience, she was hired for the academic year 1972-73 at the rank of lecturer (part-time), receiving an annual salary of $3,000.

During the fall semester, 1972, appellant taught one section of the basic design course. Prior to 1975, a detailed student manual for this course did not exist, and each section teacher was free to fashion his own course curriculum after reading the course description in the School of Architecture's annual bulletin, and consulting with the dean and other faculty members teaching the course. Ms. Powell did not receive any criticism from other faculty members during her first semester on the faculty.

In December, 1972, appellant again met with the dean, who expressed an interest in promoting her to a full-time position. The following spring, however, the school's Committee on Appointments, Tenure, and Promotion voted not to promote the appellant, but to permit her to continue teaching part time on the condition that she not teach basic design. Appellant was told that she would not be teaching the design course because of a decrease in enrollment; she was not told about the committee's vote.

The dean, on his own initiative, promoted Ms. Powell to the rank of part-time visiting assistant professor and raised her salary to $5,500 per year. The parties did not enter into a written agreement concerning the 1973-74 school year at that time, and there was subsequently considerable misunderstanding as to appellant's teaching responsibilities. It was finally determined that she would teach architectural rendering,[5] serve as advisor to minority

5 No formal description of the rendering course was developed until September, 1974. (App. at 129) The school's faculty disagreed as to whether rendering was best taught by an architect or an artist.

students, and deliver five guest lectures on non-western architecture.

In November, 1973, appellant was advised by the dean that her employment status was to be reviewed by the Tenure Committee. Shortly before the Thanksgiving vacation, she was asked to provide the committee with a summary of her Master's thesis, and samples of her students' work. The appellant was under the impression that she had only a couple of days during which to organize her submission, although the dean testified that he told her that the material was not required until December 1, an approximately ten-day period. Appellant submitted those student projects which had been left in the studio during the vacation period, believing that they did not represent the best of her students' work; she also submitted a hand-written summary of her thesis. She did not, however, request a postponement of the committee meeting.

The Tenure Committee met on December 1, 1973 to consider the appellant's continued employment during the 1974-75 school year. The dean, six faculty members, and two students attended the meeting, which focused, in relevant part, on Ms. Powell's written statement, and on an evaluation of her students' projects. The minutes of this meeting indicate that there was some discussion of the appellant's approach to a "black aesthetic," and that a white, female faculty member was permitted to delay committee consideration of her case. In a secret ballot taken at the meeting, eight individuals voted in opposition to, and one voted in favor of, continuing appellant on the architecture faculty.

Those who voted against the appellant testified before the New York State Division of Human Rights that their

votes were based on an evaluation of the student work, and on the appellant's background and relative inexperience. They testified further that their attitudes had not been influenced by the appellant's race or sex.

The dean transmitted the results of the committee vote to the appellant, indicating that he believed that the committee thought the appellant unduly "nationalistic." [6] The appellant refused to submit a letter of resignation, appealing the committee's decision to the university's Subcommittee on Academic Freedom. The subcommittee did not find any evidence of discrimination, but did believe that there had been procedural irregularities in the disposition of the case. It recommended the reinstatement of the appellant, or alternatively, the payment of compensation, but these suggestions were rejected by the dean.

Ms. Powell received a letter of termination in May, 1974. The architecture school later hired a white male with a master's degree in architecture to teach rendering, and a white female with a Master of Fine Arts degree, to teach basic design. It also hired a white female with a Master's and Doctoral degree in history to teach architectural history.[7]

III.

On this appeal, Ms. Powell asserts that her dismissal was the product of racial and sexual bias, and hence unlawful. She contends that similarly qualified teachers who

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6 This testimony was discounted by the trial court in view of the dean's favorable attitude toward the appellant.

7 At the time that the architecture school refused to renew Ms. Powell's contract, three male and one female faculty members resigned from the faculty. Subsequently, two men resigned, and the contracts of one man and one woman were not renewed. None of these individuals taught basic design or rendering.

were white or male received preferred treatment, and that the justification for her dismissal offered by the Tenure Committee was merely pretextual.

By contrast, the appellees argue that Ms. Powell failed to prove that her dismissal was motivated by unlawful bias. They assert that the Tenure Committee made a valid qualitative judgment which should, in the absence of a clear showing of discrimination, be respected by reviewing courts.

Both the appellees and the trial court place great emphasis on our opinion in *Faro* v. *New York University*, 502 F.2d 1229 (2d Cir. 1974), where we wrote:

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally" (Applt's Br. p. 26). . . . Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. [502 F.2d at 1231-32]

In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment prac-

tices.[8] Other courts, while not citing *Faro*, have concurred in its sentiments.[9]

This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.

As originally passed, Title VII of the Civil Rights Act exempted all educational institutions with respect to faculty employment practices. 42 U.S.C. §2000e-1 (1970), as amended. This exemption had not been part of the original Senate bill, but was proposed in a substitute bill submitted by Senators Dirksen and Mansfield, and adopted first by the Senate and later by the House. There is vir-

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8 See, *e.g.*, *Huang* v. *College of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977); *Johnson* v. *University of Pittsburgh*, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977); *Cussler* v. *University of Maryland*, 430 F. Supp. 602, 605-06 (D. Md. 1977); *Peters* v. *Middlebury College*, 409 F. Supp. 857, 868 (D. Vt. 1976); *Labat* v. *Board of Education*, 401 F. Supp. 753, 757 (S.D.N.Y. 1975); *Moore* v. *Kibbee*, 381 F. Supp. 834, 839 (E.D.N.Y. 1974).

9 See, *e.g.*, *Megill* v. *Board of Regents of the State of Florida*, 541 F.2d 1073 (5th Cir. 1976); *Stebbins* v. *Weaver*, 537 F.2d 939, 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Duke* v. *North Texas State University*, 469 F.2d 829, 838 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); *EEOC* v. *Tufts Institution of Learning*, 421 F. Supp. 152, 158 (D. Mass. 1975); *Keddie* v. *Pennsylvania State University*, 412 F. Supp. 1264, 1270 (M.D. Pa. 1976); *Green* v. *Board of Regents of Texas Tech University*, 335 F. Supp. 249, 251 (N.D. Texas 1971), *aff'd* 474 F.2d 594 (5th Cir. 1973); *Lewis* v. *Chicago State College*, 299 F. Supp. 1357, 1360 (N.D. Ill. 1969).

tually no legislative history, however, which indicates the rationale for the exemption of educational institutions.

The Equal Employment Opportunity Act of 1972, 86 Stat. 103, sec. 3 (1972), amended Title VII to bring educational institutions within the purview of the Act. In the words of the House Report:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. [H.R. Rep.No. 238, 92d Cong., 2d Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2155]

The pervasive nature of discriminatory university employment practices has been well documented in the literature,[10] and was characterized in the Congressional debates preceding the passage of the 1972 amendments as "truly appalling," "gross" and "blatant." [11]

It is clear beyond cavil, then, that the Congress has evidenced particular concern for the problem of employment

10 H. Astin, *The Woman Doctorate in America* (1969); L. Lewis, *Scaling the Ivory Tower: Merit and its Limits in Academic Careers* (1975); A. Rossi, *Academic Women on the Move* (1973); E. Wasserman, et al., *Women in Academia: Evolving Policies Toward Equal Opportunities* (1975); Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 Journal of Law and Education 429 (1976); *Hearings on Federal Higher Education Programs Institutional Eligibility Before the Special Subcommittee on Education of the House Committee on Education and Labor*, 93d Cong., 2d Sess., pt. 2B (1975).

11 See 118 Cong. Rec. 117 (1972) (remarks of Senator Bayh) and 118 Cong. Rec. 1992 (1972) (remarks of Senator Williams).

bias in an academic setting. Indeed it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias.

Accordingly, while we remain mindful of the undesirability of judicial attempts to second-guess the professional judgments of faculty peers, we agree with the First Circuit when it "caution[ed] against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of . . . discrimination in institutions of higher learning as readily as for other Title VII suits." *Sweeney* v. *Board of Trustees of Keene State College,* Nos. 77-1243-44, slip op. at 13-14 (1st Cir., Jan. 4, 1978). See also *Egelston* v. *State University College at Geneseo,* 535 F.2d 752 (2d Cir. 1976).

It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.

IV.

The district court correctly observed that the appropriate starting point for the evaluation of a personal claim of job discrimination brought under Title VII is *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). There the Court indicated that:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be

> done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. [411 U.S. at 802]

If the employer is able to sustain this burden, the burden shifts again to the plaintiff, who must "show that [defendant's] stated reason for [plaintiff's] rejection was in fact pretext." 411 U.S. at 804.

A.

The trial court proceeded to indicate that Ms. Powell failed to make out a prima facie case of discrimination for two reasons. First, the court felt that Powell failed to prove that she was "qualified" to teach on the architecture faculty, given the negative faculty evaluations of her work. Second, the court indicated that Powell failed to demonstrate that other individuals possessing similar qualifications were hired after Powell was fired. We believe that the trial court applied an erroneous legal standard in reaching these conclusions, and that Ms. Powell has made out a prima facie showing of discriminatory treatment.

With respect to the first of the court's findings, we believe that the court's approach unnecessarily collapses the steps suggested by *McDonnell Douglas* by shifting considerations which are more appropriate to the employer's rebuttal phase to the earlier requirement that the employee

demonstrate competence to perform the specified work. This is not merely of formal consequence, for it has the practical effect of requiring the employee to prove not merely that he possesses the basic skills necessary for the job, but rather that he is the best-qualified candidate for the job, under the criteria suggested by the employer. As can be seen in the present case, this burden is extremely difficult to meet if the employer's claim that the employee did not meet some unstated level of performance is sufficient to negate the employee's offer of proof. In this respect, we agree with the Seventh Circuit's view that under *McDonnell Douglas*

> [t]he plaintiff need not show perfect performance or even average performance to satisfy this element. He need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him.
>
> . . .
>
> Satisfactory performance is an ordinary prerequisite of continued employment, just as job qualification is an ordinary prerequisite to hiring. [Citation omitted.] However, the plaintiff need not, and indeed cannot, disprove as a cause of his discharge a source of dissatisfaction of which he is unaware. Accordingly, the employer's acceptance of his work without express reservation is sufficient to show that the plaintiff was performing satisfactorily for the purpose of shifting the burden of proof.
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> [*Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277 at 1283 (7th Cir. 1977)].

Ms. Powell was hired by the School of Architecture after a careful review of her qualifications, training, and past performance. In addition, she was reappointed after her first year of teaching. While some members of the faculty may have expressed dissatisfaction with some aspects of her work, this dissatisfaction was never communicated to Ms. Powell, who was, accordingly, in no position to disprove these alleged inadequacies.

We agree with the Seventh Circuit that proof of competence sufficient to make out a prima facie case of discrimination was never intended to encompass proof of superiority or flawless performance. If an employer is dissatisfied with the performance of an employee, he can properly raise the issue in rebuttal of the plaintiff's showing. In the context of this case, Ms. Powell has demonstrated that she possesses the basic skills necessary for the performance of her job, and has thereby made out a prima facie showing of competence.

With respect to the second factor, the School of Architecture's hiring of a white female with a M.F.A. degree to teach basic design is sufficient to satisfy the *McDonnell Douglas* requirement that the position remain open and the employer seek applicants from persons of the complainant's qualifications. The trial court believed that a time gap of over two years between the appellant's discharge and the other individual's employment precludes the possibility that the other individual "replaced" appellant. And the trial court may well be correct in the more common case in which hiring is ongoing and employees largely fungible.

In the context of university employment, however, a department or school may hire only a small number of individuals each year, and the fact that a position may go unfilled for a time does not indicate that the position has been terminated. It only indicates that the school has not yet located the candidate of its choice.

Thus Ms. Powell has, as a matter of law, been able to demonstrate both her competence and the architecture school's ongoing hiring efforts. This, coupled with undisputed proof of minority status and the termination of her employment contract, is sufficient, under *McDonnell Douglas*, to make out a prima facie case of discriminatory treatment.

B.

The more difficult issue before us is whether, on the present state of the record, the School of Architecture can be said to have successfully rebutted Ms. Powell's showing by articulating a "legitimate, nondiscriminatory reason for the employee's rejection."

In this regard the trial court found that:

> [A] contract for the academic year 1974-75 was not offered to [the appellant] for one reason only. The Tenure Committee honestly reached the conclusion that plaintiff's performance fell short of teaching requirements, after affording her a fair opportunity to demonstrate her teaching ability. This determination was devoid of any racist or sexist base. The plaintiff has not demonstrated the assigned reason to be a pretext for prohibited discriminatory conduct. All of the eight members of the Tenure Committee who voted against plaintiff testified that they voted to terminate plaintiff essentially because of the poor work product of her rendering students, and her inadequate architectural background. These are matters of obvious

concern to the architecture faculty and, therefore, are unquestionably legitimate reasons for the vote.

[App. at 17-18.]

Rule 52(a) of the Federal Rules of Civil Procedure requires that findings of fact made by a trial court shall not be set aside unless clearly erroneous. Where, as here, a case is heard on the basis of a record developed before another judge, a trial judge is necessarily unable to make first-hand assessments of credibility, and the broad deference normally due a trier of fact under the federal rules may be somewhat attenuated. See 5A *Moore's Federal Practice* ¶52.04 and the cases cited therein.

Nevertheless, after a careful review of the record, we cannot say that the trial court's finding in the instant case is clearly erroneous. The court considered testimony by all eight members of the Tenure Committee, and was unable to discern either overt or covert discrimination on the part of those officials. And our own independent review of the record confirms these findings, which are supported by substantial evidence, and which do not leave us "with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

It would, of course, have been preferable if the School of Architecture had presented the court with a more fully developed description of the appellant's duties, and the criteria used in assessing her performance. In that way the legitimacy and rationality of the school's hiring practices would have been more immediately evident. But the law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory. And the record here simply does not

support the appellant's contention that her termination was the result, in whole or in part, of racial or sexual animus.

Accordingly, we affirm the judgment of the district court.

MOORE, *Circuit Judge* (Concurring):

In the dicta comprising Part III, the majority opinion purports to strike a blow for justice by encouraging the courts to intervene into the affairs of our colleges and universities. Any reluctance of the federal courts to interfere with the decision-making process of universities does not come from an interest in promoting discrimination. Rather, such reluctance reflects the inability of the courts to perform "a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate." *Faro* v. *New York University*, 502 F.2d 1229, 1232 (2d Cir. 1974). The courts in cases cited by the majority, in my opinion, have not abdicated their responsibility to uphold the Equal Employment Opportunity Act of 1972. Instead, they have indicated the difficulty faced by courts in attempting to evaluate the ability of a faculty member.

> "A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." *Lewis* v. *Chicago State College*, 299 F. Supp. 1357 (N.D. Ill. 1969).

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This difficulty has done no more than create a justified reluctance among the courts to override the "rational and well-considered judgment of those possessing expertise in the field". *Green* v. *Board of Regents of Texas Tech University,* 335 F. Supp. 249, 250 (N.D. Tex. 1971), *aff'd,* 474 F.2d 594 (5th Cir. 1973). *See Huang* v. *College of the Holy Cross,* 436 F. Supp. 639, 653 (D. Mass. 1977); *Peters* v. *Middlebury College,* 409 F.Supp. 857, 868 (D. Vt. 1976). If we took a "common sense position" in *Faro* (and there is no good reason here presented to abandon this approach), we appear to have the support of many other courts.

As to the merits of this case, I agree that Syracuse University successfully rebutted the contention that Powell's termination was the result of racial or sex animus. In addition, I believe that Powell did not even establish a *prima facie* case of discrimination. The Supreme Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) articulated a standard that the complainant must meet in order to establish a *prima facie* case. The complainant must show:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13]

13. The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." Id. at 802.

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In *McDonnell Douglas* the company did not "dispute [claimant's] qualifications and acknowledge[d] that his past work performance in [McDonnells Douglas'] employ was satisfactory." *Id.* The particular qualifications of a job must of necessity vary with the occupation and the type of employer. Qualifications for a job to work as a mechanic for a manufacturer (as in *McDonnell Douglas*) are more easily measured and quantified than qualifications to hold a faculty position at a university. Here Powell did not prove that she was qualified for the job for which Syracuse University was seeking applicants and that Syracuse University continued to seek applicants with Powell's qualifications.

While generally an architecture degree is a prerequisite for teaching in the School of Architecture at Syracuse University, exceptions are made for certain courses such as history of architecture and basic design. Powell, with a degree in fine arts, had no teaching experience at the time she was hired as a part-time lecturer in 1972. Even assuming that she met the minimum educational requirements to be employed initially in a teaching position, the mere attainment of a degree does not qualify an individual to teach in a university. Powell never demonstrated that she was qualified to continue her post at Syracuse University. To the contrary the members of the Tenure and Promotion Committee based their conclusion not to rehire Powell on the grounds that her academic background was inadequate and her students' work was inadequate. Also, there was some question whether her personality was appropriate for teaching and counseling students. These are factors which may properly be taken into account in determining whether a faculty member possesses the "qualifications" for continued employment.

Appendix B

In addition, Powell was not replaced by someone of comparable qualifications. After Powell was terminated in May 1974, Christopher Gray was hired in the fall of 1974 to teach the rendering course. He possessed different qualifications, having degrees in architecture and prior teaching experience. Subsequently, two white women without architectural degrees were hired. One, with a Ph.D. degree in art history, was hired to teach history of architecture, a course which Powell never taught. The other, with a degree in fine arts, was hired in the fall of 1975 to teach basic design. This was two years after Powell had ceased teaching that course, and she could not be considered to have "replaced" Powell.

Thus, I would conclude that Powell failed even to make a *prima facie* case of discrimination. This does not, as the majority opinion suggests, force the plaintiff to prove she is the best qualified for the job. Rather, it only forces the plaintiff to prove that she does meet at least the minimal level of competence required of a university faculty member, which she did not prove.

Appendix C

Statutory Provision Involved

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Appendix D

Plaintiff's Exhibit #14 in Record

Sunday December 1, 1973

Appointments, Promotion, and Tenure Committee Minutes

Present: Van Keuren, San Jose, Fisher, Gabriel, Skoler, Livengood, Schueller, Rippeteau, Lee

1. Announcements made by John Fisher
   a. Charles Croom's appointment extension will not be considered by Central Administration (Fisher to inform Croom)
   b. Schedule lists two (2) faculty members teaching courses not yet approved by Committee:
      1. Scarbrough to teach in Spring
      2. 30-40 want 211 (structures) to be taught in Spring (taught last year by C. Croom) could be taught by Prof. Eng. Soda who wants to teach. He is a structural engineer.
      3. Virgus Streets to teach in Community Design Center when Administration approves.

Q. Are there funds for Scarbrough? Might be special funds, use of Dozier funds

Point: Lesnikowski

Reaward of contract
Curriculum Vitae read by Van Keuren
A/C system in office made subject of activity—Research in Housing, Urban Planning

Appendix D

Q. Any indication that she would teach another course? (Father died) wants to teach full-time.

Comments can be forthcoming after Tuesday Jury (L. Skoler)

Student's feedback good (last year)

Reiterated Jury experience from 1972; Fact that industrialization was dropped as well as the notion of social architecture.

Shouldn't we take into consideration more facts (being here, already teaching, etc?) rather than making a gap in curriculum.

Remark to contrary that

Length of time in project (full semester) is problem Rippeteau would disqualify self

Question that sufficient information does not exist in case of Lesnikowski so that vote would be delayed until more information made available.

2.

Oglesby Continuance

a. Does it overlap in any other course?
b. Questions stemming from fact that Service Course to University rather than in-house?
c. Large percentage of teaching is done in-house.
d. School now making +300,00 for S.U.
e. Would budget be decreased if Oglesby taught in Arts & Sciences? (yes)

f. Generally speaking, if service courses are taught, shouldn't they be taught in the educational context that they are formed?

g. Discussion of service courses

Relation of course to Virgus Streets
(Redundant—psych city)

Workshop, Community Service—Powell—Streets

Powell

description of Master's Thesis
minority interests
minority goals in power
community separation
Third World Study

Comments on Thesis
Counsel to Black students
Drawing for Freshmen

(abrasive) Quickness in assigning values, question ability to counsel. Wants to see architectural experience and education in translating values to community values

Experience, personality required.

Linkage in community
Experience in actual service in Community?
Ability to correlate to other Blacks?
What community does school serve?

What is level of minority substantiation?
Icon model? What model is she talking about and why?
Comments are questionable? Are students in a real position to answer question?
Bias

Advising in Black
She will refer them to someone else.

Advising needs a broad role
What type of artist is she?

Black Architecture, does it exist?
Dozier spoke of Black Architects?

3.

What do Black students want? His won experience in teaching and speaking does not seem to hold true—want a complete Architecture education

Black should go to black schools if they want to become Black Architects. If one goes to an integrated school then he must submit to an area of complete integration

Agree with Lee in statement about school within School. Points of view on "minority" definitions meaning black only (see also students) "genetic architecture"

Discuss on credentials basis to see if permanent employment.

Minority scholarships are also Hispanic-American. Special programs for minority students are necessary to maintain minority scholarships—this means counciling tutoring, courses, etc.—which allude to maintaining Black programs.

Judgements:

A. Counseling minorities—own statement seems to only include Blacks.

b. Seems to have an idea of knowledge/genetics

Appendix D

Programs in Schools (special)—how far does it go
Special standards?
Special grading standards?

There might be a distinct conceptual difference in "tracking" a minority student rather than an architectural distinction.

Voting should be done on credentials in Architecture/Art especially when students are exposed to her *after* experience gained.

Does position required administrative role? Is Virgus Streets better Teaching, Administrative, etc.

We should talk about position.

Is there a need?
Is there sufficient money?

Appears she is demanding a full-time position.
Positions—competence
Affirmation Action
Assessment of Affirmative Action by V. Chancellor
Reading 1 page of recruiting problems and activity in minority recruitment

Raises points of characteristics of Art superseded by characteristics of artist

Watts

Negative comments. Business techniques—thinks Watts knows material, particularly in economic-business terms; Can find ways in which Architecture as a profession may be successful—(as inferential information) in reversing position. . .
Student interest is low based on incompetence

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Agreed that "both Faculty and Student are Incompetent", but must realize significance of statement

Does Course = Doug Watts?

If Watts leaves, does course leave?

Does Watts want to communicate efficient business matters and methods?

Does Watts want to make good architects or good business men?

Thinks student input is poor. Watts is good in lecture/seminar

Voting

Watts (to continue)
1 no
8 yes

Powell (to continue)
1 yes
8 no

Oglesby (redundancy in Streets)
Motion to postpone voting made by J.L. seconded by L.S. sustained

Lesnikowski
abstain 5
no 2 result of vote demands postponement based on inadequate
yes 2 qualitative data

Steinfeld
Wants to teach Research course and "Environment and Aging"—and not DESIGN

Appendix D

Discussion on course contents and needs to make a specialty of it from a design standpoint

What is Steinfeld going to teach next year?
½ Time based on part-time (Gerentology-Architecture Design)

Behavioral Science
Research Component

Q. If we are to take Steinfeld over Full-time (and Gerentology dropped will we have him teach design for 6 c.h.

Gerentology will be part-time appointment. What will role in Research be next semester? "Correspondence School activity in Architecture" "Barrier-Free Architecture"

Research with Graduate Students only

Abruptness

5.

Agree

Vote: Maintenance at ½ position precluding activity in Design Studio (Motion to effect that position continues in Gerentology & Research only)

6 yes
2 no
1 abstain

VonScheven
8 yes
1 no

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Allor

reappointment at same ½ time, continuance of same course at undergraduate level

brings up point of who should teach peripheral service courses: behavioral etc. and labelling it by inference as dynamic in the discipline as dominant and not only applicable as a way of thinking out reflecting, rather than as an end

There is so much complexity in the world, there should be a team approach. The problems of the world should be "team approached"

How does one establish the knowledges which we are short of? What are trade offs? What is Allor's position in our curriculum?

1 abstain
3 yes
5 no
Not taken as a personality role in case of Allor rather than place in curriculum?

Virgus Streets: Part-time appointment (Assistant Prof.)
Point of disclosure of salaries for new faculty should be made because of budget and needs of School of Architecture

Concepts of Community (for Planning in the Inner City) Community Development

Oglesby teaching Psych-City

—Comments on budget relationship to program needs
—What is school doing in a planner?
—What is Streets doing in physical planning?

—Street lecture, honest about his experiences, especially when he made strong point of failure based on lack of experience
—Vagueness in status and role

Watts

Motion made to table action on Virgus Streets pending research into availability of personality vs. program; over a longer period of time, hopefully in time for Spring and if not then, Fall 1974

Move to postpone action on Virgus Streets as Dir. of Community Design, and make extensive search for candidates with Arch. education and experience by December 14, 1973
6.
until December 14, 1973

Motion made and passed

9. Oglesby covers Comm. Dev. until next year

6 yes
2 no
1 abstain

Scarbrough

Hired for one semester. Did not want appointment for one year.

Felt responsibility for students, wants to continue to section.

Positively wants to return to practice since something happened.

7 yes
1 no
1 abstain

Sodja

Motion made to table vote on Sodja

Search: CDC
Historian
Structures
Technology

Appendix E

Plaintiff's Exhibit #'s 17, 19, 20 in Record

SYRACUSE UNIVERSITY
SCHOOL OF MANAGEMENT
116 COLLEGE PLACE, SYRACUSE, NEW YORK 13210

EXHIBIT 17

March 14, 1974

Dean John Fisher
School of Architecture
417 Slocum Hall

Dear Dean Fisher:

As you know, Ms. Geraldine Powell has complained to the Senate Sub-Committee on Academic Freedom, Tenure and Professional Ethics concerning the circumstances surrounding the termination of her employment in the School of Architecture. Our committee has inquired into this matter and has concluded that there is no evidence of Ms. Powell's academic freedom being violated. On the other hand we are of the opinion that she had legitimate reasons to complain about the procedures which were followed in her case. The following facts, as we see them, have led us to our conclusion.

1. Ms. Powell was employed for the 1972-73 academic year as a part time instructor, with a terminal appointment.
2. Prior to the 1973-74 academic year she was proposed by the Dean for a full time position. The relevant committee of the College disagreed with the Dean and recommended that she be employed in 1973-74 as a

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part time, 1/3, instructor. This would be a new contract although it effectively duplicated the one for 1972-73.

3. Despite this recommendation of the committee, the Dean appointed her to a part time, visiting assistant professorship, with a one year terminal appointment ending May 11, 1974. The extent to which Ms. Powell was made aware of the disagreement between the Dean and the committee is not clear.
4. In the Fall of 1973 the Dean discussed with Ms. Powell the possibilities of full time employment for 1974-75.
5. Shortly after the discussion just referred to the faculty committee reviewed the employment status of Ms. Powell and decided that she should not hold a faculty position after the end of the academic year. This review apparently was undertaken as though she were on a probationary appointment despite the fact that she was on a terminal appointment. Nevertheless, it was somewhat perfunctory in the sense that Ms. Powell was not notified that her case was being reviewed, nor was she given a specific opportunity to present facts relevant to her case. (In view of the fact that Ms. Powell was on a terminal appointment the faculty committee was under no obligation to conduct any sort of review, or, if it decided to conduct a review, to carry it on in any matter other than it chose.)
6. A critical issue arose at the next step. The Dean notified Ms. Powell that her services would not be required beyond the end of the academic year and informed her that she had the right of appeal to the Senate Sub-Committee on Academic Freedom, Tenure and Professional Ethics.

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The Senate Sub-Committee on Academic Freedom, Tenure and Professional Ethics does not contest the right of the faculty committee to make a judgement about the academic qualifications of Ms. Powell. However, the Senate Sub-Committee on Academic Freedom, Tenure and Professional Ethics is of the opinion that the faculty committee's treatment of the case procedurally as though it were a probationary renewal case, as attested by the notice sent her, as well as the apparent failure of the Dean to make clear the respective roles that he and the faculty committee played in authorizing her employment, when taken together, gave rise to such expectations on her part that she now has a right to expect some sort of administrative relief on her behalf.

Sincerely yours,

/s/ Eric W. Lawson, Chairman
Eric W. Lawson, Chairman
Senate Sub-Committee on Academic Freedom,
Tenure and Professional Ethics

EWL/mgf

cc: Ms. Geraldine Powell
Vice Chancellor Prucha

Appendix E

SYRACUSE UNIVERSITY
School of Management
116 College Place, Syracuse, New York 13210

Exhibit 19

April 8, 1974

Dean John Fisher
School of Architecture
Syracuse University

Dear Dean Fisher:

On March 14, on behalf of the Senate Sub-Committee on Academic Freedom, Tenure and Professional Ethics, I wrote you with respect to the issues involved in the complaint of Ms. Geraldine Powell and I set forth the conclusion of our committee. To date I have received no response.

Ms. Powell has informed the committee that you have not spoken to her about the matter. The committee has directed me to inquire of you what steps you intend to take and when you propose to do so. We call to your attention the fact that the semester is rapidly drawing to a close and that the problem requires immediate attention.

Sincerely yours,

/s/ Eric W. Lawson, Chairman
Eric W. Lawson, Chairman
Senate Sub-Committee on Academic Freedom,
Tenure and Professional Ethics

EWL/mgf

cc: Vice Chancellor Prucha
Ms. Geraldine Powell

Appendix E

SYRACUSE UNIVERSITY
SCHOOL OF MANAGEMENT
116 COLLEGE PLACE, SYRACUSE, NEW YORK 13210

EXHIBIT 20

April 9, 1974

Dean John Fisher
School of Architecture
Syracuse University

Dear Dean Fisher:

Your letter of April 3 reached me after I had written my last note of inquiry to you.

The Senate Sub-Committee on Academic Freedom, Tenure and Professional Ethics is not prepared to prescribe exactly what the nature of our recommended administrative relief should be. We are not aware of all of the possibilities which are available to you. The committee has not expressed itself on this matter other than to indicate that Ms. Powell is entitled to more than a gesture. I would suggest that the committee would be satisfied to see some type of employment or some type of compensation made available to Ms. Powell.

Sincerely yours,

/s/ ERIC W. LAWSON, Chairman
Eric W. Lawson, Chairman
Senate Sub-Committee on Academic Freedom,
Tenure and Professional Ethics

EWL/mgf

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Supreme Court, U. S.
FILED
NOV 1 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-566

GERALDINE POWELL,

Petitioner,

— *v.* —

SYRACUSE UNIVERSITY, DOCTOR MELVIN EGGERS, CHANCELLOR OF SYRACUSE UNIVERSITY, SCHOOL OF ARCHITECTURE, A SUB-UNIT OF SYRACUSE UNIVERSITY, JULIO SAN JOSE, ACTING DEAN OF THE SCHOOL OF ARCHITECTURE, SYRACUSE UNIVERSITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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In The

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— *v.* —

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 580 F.2d 1150.

QUESTION PRESENTED

In rejecting petitioner's Title VII claim of racial discrimination, did the courts below apply the proper analysis of a defendant's burden of proof in the rebuttal of a prima facie case of discrimination?

STATEMENT OF CASE

This action was brought in the United States District Court for the Northern District of New York against respondents Syracuse University, the School of Architecture, and two present administrators, alleging discrimination in appellant's separation from employment based on race and sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

Before filing suit in the District Court, appellant Geraldine Powell, a former part-time faculty member of the School of Architecture, had filed a claim with the New York State Division of Human Rights against the University and present and former administrators, alleging unlawful discrimination in employment based on race, color, and sex. After five days of public hearings, the Division of Human Rights found there had been no discrimination and dismissed the complaint. No appeal was taken from this decision.

Following discovery, the parties entered into a stipulation submitting the case to the District Court upon the transcript of plaintiff's administrative hearings before the New York State Division of Human Rights, stipulated facts and exhibits, and the parties' briefs (A-3a).[1]

The District Court ordered the complaint dismissed after finding that plaintiff had failed to prove a prima facie case of discrimination and that, even assuming a prima facie case had been proven, the respondents had rebutted the prima facie case by proving that petitioner was terminated for legitimate non-discriminatory reasons (A-19a).

[1] All page references, unless otherwise indicated, are to the petitioner's petition for a writ of certiorari. References to pages of the body of that petition are indicated by a single numeral. References to pages of the appendices of the petition are marked with an "A".

The Court of Appeals affirmed the judgment of the District Court based on the conclusion that petitioner failed to sustain the burden of proving that her termination was the result, in whole or in part, of racial or sexual animus (A-39a). The Court of Appeals concluded that petitioner had established a prima facie case under this Court's analysis in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), but that respondents had successfully rebutted petitioner's proof by articulating legitimate, non-discriminatory reasons for termination of her employment (A-37a).

The findings of fact contained in the District Court's decision and discussed in the Court of Appeals opinion are unequivocal: Petitioner's employment was terminated based on the Architecture School's Tenure Committee determination that petitioner's ". . . performance fell short of teaching requirements, after affording her a fair opportunity to demonstrate her teaching ability. This determination was devoid of any racist or sexist base" (A-19a).

Contrary to petitioner's repeated assertions that " . . . the only evidentially documented factors discussed at the time of the adverse employment decision were race oriented. . .", the facts indicate that the Tenure Committee considered the issue of black architecture as an academic pursuit. Petitioner's *own* race is totally irrelevant to this consideration and plaintiff's Exhibit #14 in the Record (A-44a) reveals that the Committee considered only work-related factors.

Furthermore, all eight Committee members who voted against the petitioner's continuation as a faculty member testified before the New York Division of Human Rights as to the reasons for their votes (A-8a and A-9a; A-28a and A-29a). All of these members testified that their vote was not influenced by racial or sexual factors (A-9a; A-29a). The reasons given by these members for petitioner's termination were work-related reasons, such as petitioner's lack of teaching qualifications and the poor work of petitioner's architecture students (A-8a and A-9a).

Petitioner misstates the District Court's findings regarding the testimony of Professor Lee (a Tenure Committee member) by asserting that neither Professor Schueller nor Professor Lee voted against petitioner based on evaluation of her students' work (6). The District Court, instead, found that:

> Professor Lee, the only black member of the Tenure Committee, voted against continuing plaintiff on the basis of her students' work, which he felt was not sufficiently developed to permit them to continue their architecture education . . . , and on the basis of his observations of plaintiff's studio. (A-9a).

Petitioner claims that "[t]he ultimate consequence of the decision below is to insulate largely white University committees from the scrutiny of a federal court . . ." (7). However, it must be recalled that the instant case is one in which petitioner's claim of race and sex discrimination has been scrutinized by the New York State Division of Human Rights including a hearing resulting in a finding of no discrimination. In addition, there has been an independent federal District Court trial, and an appellate affirmance of the District Court's finding of no discrimination.

REASONS FOR DENYING THE WRIT

I. In Title VII cases alleging disparate treatment of an individual on the basis of race or sex, the law is settled that once the plaintiff proves a prima facie case, defendant in rebuttal need only articulate some legitimate, nondiscriminatory reason for its actions.

On three occasions this Court has discussed what proof by an employer will rebut a plaintiff's prima facie case of discrimination, petitioner's claim to the contrary notwithstanding. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Furnco Construction Corp.* v. *Waters*, _____ U.S. _____, 98 S. Ct. 2943 (1978). In light of these cases, petitioner's suggestion, that an employer must establish by "clear and convincing" evidence its articulated nondiscriminatory reasons for the termination of an employee, is specious.

A. Proof of a prima facie case of racial discrimination permits only an inference of discrimination, which may be rebutted by an articulation of a legitimate nondiscriminatory reason for the action of the employer.

The starting point for any discussion of the burden of proof in individual employment discrimination cases is *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

In *McDonnell Douglas*, this Court dealt with a claim of racial discrimination in the hiring procedures of an employer.[2] The Court, in treating the issue of the order and allocation of proof in a private, non-class action challenging employment discrimination, laid down a framework for the guidance of lower courts. The Court first set forth four requirements for establishing a prima facie case of racial discrimination. Assuming arguendo that plaintiff in this case has met these requirements,[3] the *McDonnell Douglas* framework continued with a discussion of the employer's burden of proof in rebutting the plaintiff's prima facie case. The Court said:

---

[2] The principles of *McDonnell Douglas* have been applied to discharge cases although *McDonnell Douglas* itself involved a Title VII action challenging a refusal to hire. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Garrett* v. *Mobil Oil Corp.*, 531 F.2d 892 (8th Cir. 1976); *Potter* v. *Goodwill Industries*, 518 F.2d 864 (6th Cir. 1975); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974).

[3] The District Court, in the words of the Second Circuit Court of Appeals, believed that plaintiff had failed to make out a prima facie case for two reasons. The District Court felt that Ms. Powell had failed to prove that she was qualified to teach on the architecture faculty, given the negative faculty evaluations of her work. In addition, the District Court held that Ms. Powell had failed to demonstrate that other individuals possessing similar qualifications were hired after Powell was fired

> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employer's rejection . . . Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. *We think that this suffices to discharge petitioner's burden of proof at this stage* and to meet respondent's prima facie case of discrimination. 411 U.S. 792, 802-803.
>
> (emphasis added)[4]

The third and final part of the *McDonnell Douglas* framework deals with the situation where the employer has successfully met a Title VII plaintiff's prima facie case. The Court said that the plaintiff

> . . . must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were, in fact, a coverup for a racially discriminatory decision. 411 U.S. 792, 805.

Thus, proof of pretext is an integral part of the *McDonnell Douglas* framework.

Petitioner's argument that an employer should be required to adduce "clear and convincing" evidence to rebut a prima facie

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Footnote 3 (cont'd.)

(A-34a; see also A-17a through A-19a). Circuit Judge Moore, in concurring in the Second Circuit judgment below, also believed that Ms. Powell did not even establish a prima facie case. Judge Moore said that ". . . Powell did not prove that she was qualified for the job for which Syracuse University was seeking applicants and that Syracuse University continued to seek applicants with Powell's qualifications" (A-41a).

[4] In *McDonnell Douglas*, the Court also rejected the view of the Eighth Circuit Court of Appeals that because the employer's reason for refusal to rehire the employee was "subjective", it was a reason that carried little weight in rebutting charges of discrimination. 411 U.S. 792, 803.

case of racial discrimination totally ignores the final portion of the *McDonnell Douglas* burden of proof framework.[5] If the respondents had to prove "clearly and convincingly" that its articulated race neutral reasons were, in fact, the reasons for petitioner's discharge, the petitioner would confront the necessity of overcoming this proof to show that the respondents' stated reasons were pretextual. Requiring "clear and convincing" evidence at the second step of the *McDonnell Douglas* framework could render futile the attempt to prove pretext at the third step. Indeed, acceptance of petitioner's argument is tantamount to removing the third step from the *McDonnell Douglas* framework.

McDonnell Douglas therefore compels the conclusion that only an inference of discrimination is raised by a prima facie showing of discrimination by a Title VII plaintiff. Far from having to produce clear and convincing evidence to rebut a prima facie case, an employer need only come forward with some credible evidence, e.g., articulate a nondiscriminatory reason for its actions. The ultimate issue in a disparate treatment case is discriminatory motivation or intent, and under *McDonnell Douglas*, the burden of persuasion for making that showing remains always on the plaintiff.

Subsequent Supreme Court cases reinforce the conclusion that a Title VII plaintiff bears the ultimate burden of persuasion.

In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the court discussed the burden of proof in a Title VII sex-based discrimination suit. In the course of that discussion, the Court said:

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[5] Although petitioner had the opportunity to prove that the respondents' reasons for her discharge were pretextual, she failed to do so. Petitioner is now asking this Court to alter the respondents' burden of proof in the rebuttal of her prima facie case in order to avoid the effects of her failure to prove pretext.

> Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing the acts they complain of constituted discrimination in violation of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, 93 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975); *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). 429 U.S. 125, 137, fn. 14.

The Court in *Gilbert* thus interpreted its *McDonnell Douglas* burden of proof framework as not disturbing the traditional civil litigation burden of persuasion placed upon a plaintiff. If the plaintiff in a Title VII suit bears the burden of persuasion on the issue of whether an employer's acts constitute discrimination, as *Gilbert* clearly indicates, petitioner's argument that an employer must prove that the reasons for the employer's actions were not discriminatory (and by "clear and convincing" evidence, moreover) is certainly erroneous.

The Court's very recent decision in *Furnco Construction Corp.* v. *Waters*, _____ U.S. _____, 98 S. Ct. 2943 (1978) also points out the fallacy of petitioner's argument. In considering a Title VII racial discrimination in hiring suit, the Court explained again that the word "inference" describes the effect of a prima facie showing by a plaintiff.

> A prima facie case under *McDonnell Douglas* raises an *inference* of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . To dispel the adverse *inference* from a prima facie showing under *McDonnell Douglas*, the employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection." 98 S. Ct. 2943, 2949-2950. (emphasis added)

Furnco supports the conclusion that a *McDonnell Douglas* prima facie case gives rise only to an "inference" of discrimination. An inference is nothing more than a permissible deduction and does not result in a shifting of the burden of persuasion. Again, the Court has indicated that the burden of

persuasion rests always with the plaintiff in a Title VII case. The defendant-employer need only come forward with some credible evidence, by articulating a legitimate nondiscriminatory reason for its actions, to adequately rebut plaintiff's prima facie case. The plaintiff may then proceed to show that the articulated reasons are pretextual.

B. Clear and convincing evidence is used as a measure of the sufficiency of evidence, in the context of racial discrimination in employment, in only exceptional types of situations which are not presented by this case.

Petitioner's statement of reasons for granting a writ of certiorari cites (at pages 9-11 of her petition) two lines of cases where the courts have applied a "clear and convincing" standard of evidence in the context of racially motivated employment decisions. Neither line of cases has any relevance to the instant case.

Petitioner cites *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971) and other cases for the proposition that once a plaintiff has established a prima facie case of race discrimination in employment, the defendant has the burden to produce clear and convincing evidence to rebut plaintiff's case. Petitioner, however, fails to mention the narrow context of the cases that are cited. The cases cited by petitioner (on page 9 of the petition) involved the narrow situation of an ongoing conversion from a dual, segregated school system to a unitary system. A long history of *proven* race discrimination, coupled with sudden, disproportionate decimation of the ranks of black teachers when integration was finally begun, led the courts in the cases cited to conclude there had been discriminatory intent. Only clear and convincing evidence could rebut such a showing. No such facts are present in the case at bar.

Nor is the present case even remotely similar to *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), cited on page 10

of the petition for certiorari. *Keyes* involved a situation wherein a school board was found to have intentionally segregated part of the school system. In that context, the Court said that a finding of intentional segregative school board actions in a substantial portion of the school system established a prima facie case of unlawful segregative design by the school authorities in regard to other parts of the school system, and shifted the burden of proof to the school board. Once again, the context of the case was school desegregation with a backdrop of *proven* past discrimination.

The present case, where one individual claims that an isolated instance of bias in employment has occurred, is an entirely different type of case and is covered by the *McDonnell Douglas* burden of proof framework which contains no requirement for "clear and convincing evidence."

A second line of cases is cited by petitioner in the footnote on pages 10-11 of her petition to support the contention that clear and convincing evidence is required to rebut a prima facie showing of racial discrimination in employment. The burden of proof issue in these cases involves the question of who is entitled to a remedy when a plaintiff has already *proven* discrimination on the part of the employer (generally, the plaintiff has proven discrimination against a class of employees). In this context, once an individual shows he is a member of the affected class, it is presumed that individual injunctive relief and back pay is a proper remedy. The employer may rebut the presumption with clear and convincing evidence that the individual discriminatee would not have been hired (or promoted) even absent the proven discrimination.

In all of these cases, therefore, an employer had already been adjudged guilty of discriminatory practices; the only question was the proper remedy for an alleged discriminatee. In that limited context, the burden of proof shifted to the employer to escape the presumption that some type of relief would be granted to the discriminatee.

In the present case, conversely, the District Court found that plaintiff had not even made out a prima facie case of discrimination. The Second Circuit Court of Appeals concluded that a prima facie case had been shown, but found that the respondents had effectively rebutted plaintiff's case. Neither court found any unlawful discrimination by the respondents. The cases cited in the footnote of pages 10-11 of the petition for certiorari, therefore, are inapposite.

A recent Fifth Circuit case, cited by petitioner, directly rejects the contention that the burden of persuasion shifts to the employer to rebut a prima facie case by clear and convincing evidence. In *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977), a discharged black employee brought suit alleging violations of Title VII and 42 U.S.C. § 1981. The district court, in the words of the Fifth Circuit Court of Appeals, had held that the employee had established a prima facie case and that the employer, Texas Instruments (TI), in rebuttal had failed to prove by clear and convincing evidence that the employer had not discriminated against the employee (555 F.2d 1251, 1254).

The Fifth Circuit, while holding that an employer bears the burden of proving legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence, rejected the district court's formulation of the employer's burden of proof for the effective rebuttal of a prima facie case:

> *The district court clearly erred in requiring TI to establish legitimate reasons for its actions by "clear and convincing" evidence* . . . Turner's statement of a prima facie case shifted to TI the burden of articulating legitimate, nondiscriminatory reasons for its action. It was not required, as the district court indicated, to present clear and convincing evidence of such reasons. *We find no justification for casting upon the employer the extraordinary burden of proving his reasons by "clear and convincing" evidence,* the highest standard of proof applied in civil cases. 555 F.2d 1251, 1254-1255. (emphasis added)

II. The Second Circuit Court of Appeals applied the proper analysis of a defendant employer's burden in rebutting a prima facie Title VII case of racial discrimination.

The Court of Appeals made clear that it was applying the *McDonnell Douglas* framework regarding the order and allocation of proof in a Title VII suit. The Court, in fact, laid out anew the framework of *McDonnell Douglas* in its opinion, and recognized that once a prima facie case of racial discrimination had been made out, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection (A-33a and A-34a).

In determining the issue whether, on the present state of the record, the respondents had successfully rebutted the plaintiff's showing of a prima facie case, the Second Circuit panel noted the trial court's findings:

> [A] contract for the academic year 1974-75 was not offered to [the appellant] for one reason only. The Tenure Committee honestly reached the conclusion that plaintiff's performance fell short of teaching requirements, after affording her a fair opportunity to demonstrate her teaching ability. This determination was devoid of any racist or sexist base. The plaintiff has not demonstrated the assigned reason to be a pretext for prohibited discriminatory conduct. All of the eight members of the Tenure Committee who voted against plaintiff testified that they voted to terminate plaintiff essentially because of the poor work product of her rendering students, and her inadequate architectural background. These are matters of obvious concern to the architecture faculty and, therefore, are unquestionably legitimate reasons for the vote. (A-37a and A-38a).

The Second Circuit affirmed the district court's holding that the plaintiff's prima facie case had been successfully rebutted. The court emphasized its careful, independent review of the record when it said:

> . . . after a careful review of the record, we cannot say that the trial court's finding in the instant case is clearly erroneous. The court considered testimony by all eight members of the Tenure Committee, and was unable to discern either overt or covert discrimination on the part of those officials. And our own independent review of the record confirms these findings, which are supported by substantial evidence . . . the record here simply does not support the appellant's contention that her termination was the result, in whole or in part, of racial or sexual animus.
>
> Accordingly, we affirm the judgment of the district court. (A-38a and A-39a).

It is clear from the opinion of the Court of Appeals below, therefore, that "substantial evidence" supports the finding that there were legitimate, nondiscriminatory reasons for the termination of plaintiff Powell. In the light of the teaching of *McDonnell Douglas* that an employer need only articulate legitimate reasons to rebut plaintiff's prima facie case, and given the absence of any showing by Ms. Powell that the articulated reasons were pretextual, the Court of Appeals' affirmance of the District Court was unquestionably correct. Even assuming arguendo that not merely the burden of going forward but also the burden of persuasion shifted to the employer to show a lack of discrimination, substantial evidence was adduced to prove that there existed *no* overt or covert discrimination.[6]

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[6] Petitioner reiterates that race was the sole factor, or a significant factor, considered when the Tenure Committee discussed petitioner's future and made the decision adverse to petitioner. Petitioner ignores the fact that, as the District Court noted, "This discussion . . . was in response to plaintiff's submitted statement which postulated the existence of a 'black aesthetic' and called for recognition of a black perspective for understanding the needs of the black community and black students. Any committee discussion which then made reference to race followed naturally from the reading of the statement. After plaintiff injected the question of black values into the committee's consideration of her, she should not expect them

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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Footnote 6 (cont'd.)

to ignore the ideas she presented" (A-10a). Both courts below clearly concluded that petitioner's own race did *not* enter into the Tenure Committee's decision at all. The Court of Appeals, as mentioned above, held that substantial evidence was shown to prove there existed neither covert nor overt discrimination, *in whole or in part*, and the cases cited by petitioner at pages 17-18 of her petition are, therefore, inapposite.

This quantum of evidence unquestionably satisfied the employer's burden in rebuttal, whether that burden was merely to come forward with some evidence or to prove by a preponderance of evidence that there had been no discrimination. The Court of Appeals correctly so held.

CERTIFICATE OF SERVICE

Tracy H. Ferguson, Esq., one of the attorneys for the Respondents herein, certifies that on the 31st day of October, 1978, I did serve three copies of the foregoing Brief in Opposition upon the attorneys for the Petitioner by mailing the same, postage prepaid, first class, as follows:

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Respectfully submitted,

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